The Central Law Journal.

SAINT LOUIS, APRIL 27, 1877.

CURRENT TOPICS.

OUR attention has been called to the fact that it was not the chairman of the judiciary committee of the Missouri House of Representatives, Hon. D. H. McIntyre, who, "with owl-like gravity," made a speech in favor of a resolution memorializing Congress to repeal the copyright laws so far as school books are concerned. The speech was made by the chairman of another committee,—a liberal-minded and cultivated gentleman, whose name we are ashamed to mention in connection with a propesal to cheat a lot of old bald-headed and spectacled schoolmasters out of their five per cent. royalty on books which they have written. We are sorry to have made the mistake, but still sorrier that we can not, in correcting it, record as a fact that the chairman of the house judiciary committee voted against the measure. It passed by a unanimous vote, he being "absent with leave."

A LEARNED correspondent writes that he wishes to see an amendment to the bankrupt act, like the provision in the English act, to the effect that all promises by a bankrupt shall be void, unless in writing. The dodge, says he, of suing bankrupts on new promises is becoming too fashionable to be honest or trustworthy. A creditor swears to the promise; the bankrupt positively denies; the fact that he has become a bankrupt depreciates, to some extent, the value of his testimony. The law as it stands holds out a strong temptation to perjury—perjury for which there can be no punishment, as the false-swearing creditor will always swear that the promise was *confidential*. In England they were forced, by the same experience which is now upon us, to come to the plan of requiring such promises to be in writing.

A CORRESPONDENT, who appears to be well informed upon the subject, writes to us touching a note which appeared in these columns two weeks ago, in regard to the various American editions of Russell on Crimes, stating that the correspondent who gave us the points contained in that note was either in entire ignorance of the matter, or had been egregiously misinformed,—perhaps both. Our correspondent states that there have been *eight* American editions of Russell on Crimes printed and disposed of in this country, while only *four* have been disposed of in England; which, says our correspondent, shows the value and popularity of the work to be even greater here than in England, as has been the case with many other works; but he assures us, there has been no "bookseller's trick" in the reprinting of the title-pages only, as suggested in our article; for, says he, each American edition states upon its title-page the English edition which it is printed from, and the fact that the name of Judge Sharswood appears as the editor of all editions except the first, should have been sufficient to relieve the publisher from such a charge. Our correspondent states that the various editions were issued in this country as follows: The first in 1826; the second in 1831; the third in 1836; the fourth in 1841; the fifth in 1845; the sixth in 1850; the seventh in 1853; and the eighth in 1857; and that all of these were *bona fide* editions just from the press, all previous editions having been sold. The letter of our correspondent was not intended for publication; but we are glad to make use of it so far as will enable us to correct suggestions, which, uncontradicted, would have passed for facts; for we know that he is in a position to know whereof he speaks.

AMONG the bills introduced or passed by the legislature during the last week are two of special interest to the legal profession. The first is for the reporting and publishing of the opinions of the St. Louis Court of Appeals. It provides that the court shall designate what opinions delivered by it shall be reported and published, and shall appoint a suitable person whose duty it shall be to report and publish, or cause to be published such opinions, and who shall receive an annual salary of two thousand dollars, to be apportioned and paid by the district over which said court has jurisdiction, in the same manner as is provided for the payment of other expenses of said court. The reporter is required to prefix to each of such opinions suitable head-notes or syllabi, containing the points decided, together with a list of the authorities cited by counsel, giving the names of counsel; and he shall cause the same to be published at his own expense, as soon as is practicable, after enough of such opinions have been rendered to make a volume of six hundred pages. We hope this bill will be passed. The present court is composed of able lawyers, and the opinions which are already on file will make more than one volume of great value to the bar of this city and state. We would suggest that the last paragraph of this section of the bill, requiring that "the printing and binding shall be equal to the 60th volume of the Missouri Reports," be stricken out. The 60th volume of the Missouri Reports is such a wretched specimen of law printing and binding, that the proposed standard of excellence is decidedly too low, and hardly respectable.——A bill has been passed, and is at present awaiting the signature of the governor, allowing the testimony of defendants in criminal cases. The law is substantially like those which have been already adopted in Maine, California, Illinois, Kansas, Minnesota, Nebraska, Michigan, Tennessee, New York, New Jersey, New Hampshire, Nevada, Colorado, Ohio, Pennsylvania, Rhode Island, South Carolina and Wisconsin.

THE liberality of our laws in the treatment of persons suspected of crime, until they have been

convicted, is one of the most noticeable features of the Anglo-American criminal system, as distinguished from the continental. Some recent cases which have arisen would seem to show, that it is much more dangerous to charge another with a crime, than to be charged even in the face of abundant proofs of guilt. The other day, in the city of New York, a stranger complained to a police magistrate that he had been robbed in a gambling house. Upon his information the gamblers were arrested and brought before the court. They were immediately committed for trial, and bail demanded of both the accused and the prosecutor. The former were prepared; their sureties were on hand and were detained but a few minutes, while the latter, being without friends, was placed in the cells. A few days before, in another case, the prisoner presented himself for trial, well and hearty, having been out on bail for six months, while the prosecutor came into court much broken down and ill, having been for the same length of time confined in jail for want of the means of giving bail. Not a few instances have come to light lately, where criminals have escaped accusation on account of a disinclination on the part of the witnesses of the act to make martyrs of themselves even for the sake of public justice. In one case, two domestic servants witnessed one night from their window a wholesale burglary and robbery taking place in the house of a neighbor. They kept quiet, though an alarm might have insured the capture of the perpetrators; and when some weeks afterward they informed their mistress of the affair, and were asked why they did not call the police, very wisely replied that they did not wish to go to jail. There is something very wrong in a system which thus puts a premium upon the concealment of crimes, and something very anomalous in a culprit being more privileged than a prosecutor. It is as absurd as the scene which may be witnessed any day in almost any court—the prisoner leaving the room in the company of his friends, and the jury being marched away in the custody of the constable.

A BRIEF HISTORY of the case of the South Pacific Railroad Company v. Laclede County, 57 Mo. 147, will illustrate the value of law journals. In this case the Supreme Court of Missouri, in an opinion so brief and obscure that it can scarcely be mentioned in terms of respect, decided in effect that the South Pacific Railroad, which in 1871 was merged in the Atlantic & Pacific Railroad, was, under the 12th section of the act of December 25th, 1852, exempted from taxation until two years after its completion, provided no dividend had been declared prior to that time. The court placed their decision upon a judgment of the Supreme Court of the United States in The Pacific Railroad v. Maguire, 20 Wallace, 36; 1 Cent. L. J., 224, 228, 271, which they supposed governed the question, and was an authority binding upon them. Now, it happens that the case before them was not governed by the case of The Pacific Railroad v. Maguire, but was on all fours with the case of Trask v. Maguire, 18 Wall. 391; 1 Cent. L. J., 171, 175, in which the Supreme Court of the United States, on facts similar to the facts before the Missouri Court, reached a conclusion precisely the reverse of that in the former case. In Pacific Railroad v. Maguire, the Supreme Court of the United States did indeed hold that the 12th section of the act of December 25th, 1852, which exempted the property of the Pacific Railroad from taxation until a dividend should be declared, or, if no dividend were declared, until two years after its completion, was a contract within the meaning of the Constitution of the United States, which could not be impaired by a subsequent legislative act or constitutional ordinance. But the tax in question in that case was levied upon the main trunk of the Pacific Railroad, which never passed out of the hands of its original owners, and which never was the property of the State of Missouri. The Southwest Branch, afterwards the South Pacific Railroad, was in an entirely different situation, growing out of the fact that in 1866 it was forfeited to the state under the laws thereof; that the governor, in pursuance of an act of the legislature, took possession of it, and it became to all intents and purposes the property of the state, and was granted by the state to Fremont and his associates, and was by them in turn forfeited to the state, and was again, in 1868, granted by the state to Kingsland & Son and others, who organized themselves into the corporation known as the South Pacific Railroad Company; which corporation afterwards, in 1871, in pursuance of an act of the legislature, was consolidated with and merged into the Atlantic & Pacific Railroad Company. Now, Trask v. Maguire involved the right of the new Iron Mountain Railroad Company to a perpetual exemption. In that case the railroad had been forfeited to the state, had been taken into the state's custody, and had been by the state re-granted to the new corporation being a distinct corporation from the original Iron Mountain Railroad Company, although having the same name. The Supreme Court held that, when the state became the owner of the property, the exemption from taxation granted the original corporation became merged in the title of the state, and ceased; and a constitutional ordinance, prohibiting the legislature of the state from granting to any corporation exemption from taxation, having in 1865 supervened, the legislature in re-granting the property to a new corporation was powerless to revive in it the original exemption from taxation. It is thus seen that the facts of Trask v. Maguire, and South Pacific Railroad Company v. Laclede County, were exactly similar. The one case should have controlled the other; and a judicial tribunal never made a more egregious mistake than was made by the Supreme Court of Missouri, when it declared that it was obliged, by the principle decided in Pacific Railroad v. Maguire, to decide the Laclede County case in favor of the railroad company and against the pub-

lic. At the time this decision was rendered, the CENTRAL LAW JOURNAL, in which Trask v. Maguire had been published, was furnished to all the judges of the Supreme Court of Missouri, except Judge Vories who refused to receive it; and the editors of the JOURNAL flattered themselves that the judges of this high court were among their constant readers. Had this been the case, they might have saved themselves from a blunder which is not creditable to them as jurists, and which has cost the people of the state tens, if not hundreds, of thousands of dollars. We may go further, and suggest that if the able attorney, whom Laclede County in its wisdom saw fit to employ to represent it in this case, had been a reader of this journal, the blunder would never have been committed. But the time within which a rehearing can be granted has expired. The error, serious as it is, is past recalling. The matter has become, by the decision of the highest court entitled to pronounce upon it, (no federal question being involved), *res judicata*; and no matter upon what misconception it may have been founded, it is binding upon every tribunal in this state or out of it. Moral: Subscribe for the CENTRAL LAW JOURNAL, and read it.

EFFECT OF RECORDING A DEED WITHOUT INDEXING AS NOTICE TO SUBSEQUENT PURCHASERS.

This question (discussed in the JOURNAL of April 13th last, p. 340) came before the Supreme Court of Iowa, in Barney v. McCarty, 15 Iowa, 510, where it was held that the indexing was an essential part of the record, without which it was ineffectual to impart notice to a subsequent purchaser. The case arose under the Revised Statutes of Iowa Territory, passed in 1843, which contained several distinct provisions bearing on the subject. The "act to regulate conveyanees" provided that instruments of that character should be "recorded in the office of the recorder of the county in which the real estate is situated," and should "*from the time of filing the same with the recorder impart notice to all persons of the contents thereof.*" The "act concerning mortgages" repeated the same provisions, with the addition: "It shall be the duty of the recorder to indorse on every mortgage filed in his office for record, and note in the record, the precise time such mortgage was filed for record." Neither act made any provision for indexing. But by a *third* act, entitled "An act relating to the office of recorder of deeds," the recorder was required:

1st. "To file all deeds, etc., presented to him for record, and note on the back of the same the hour and day when they were presented for record."

2d. "To keep a fair book on which he shall *immediately* make an entry of every deed, giving date, parties, description of land, dating it on the day when it was filed in his office."

3d. "To record all instruments in regular succession."

4th. "To make and keep a complete alphabetical index to each record book, showing page on which each instrument is recorded, with the names of the parties thereto."

This act made no provision as to the time from which notice of the deed should commence, or what should be essential to impart notice. All these acts were passed at the same session, and within a month of each other.

Mr. Justice Dillon, delivering the opinion of the court, first refers to some cases holding that a party who has duly deposited his deed for record with the proper officer, has performed his whole duty, and will not be prejudiced by the mistake or neglect of the recorder in making the record (Nichols v. Reynolds, 1 R. I. 30; Cork v. Hall, 1 Gill, 575; Merrick v. Wallace, 19 Ill. 486; McGregor v. Hall, 3 Stew. & Port. 401; Beverley v. Ellis, 1 Rand. (Va.) 106), and holds that the law has been settled otherwise in Iowa, in Miller v. Bradford, 12 Ia. 14. See also, Calvin v. Bowman, 10 Ia. 529; Bostwick v. Powers, 12 *Ib.* 456. The opinion then holds that, construing all these acts together, as *in pari materia*, it was essential to a complete and valid registration, that the recorder should perform *all* the acts required by the last-mentioned statute, including the alphabetical indexing; that the filing of the deed by the recorder, together with the noting upon it the day and hour of filing, and the entry required to be *immediately* made on the "fair book," constituted notice, while the deed remained on file in the office, and until it was extended at length upon the records; that the provision in the statute, that the deed should impart notice "from the time of filing the same with the recorder," was intended only "to fix the *time* from which notice to subsequent purchasers should commence, and not to make such filing or depositing notice of the contents *after* the same was recorded," as remarked by Wright, J., in Miller v. Bradford, 12 Ia. 14; that the entering of the deed in the alphabetical index was an indispensable element in a legal and valid record, so as to make the *record* notice to a subsequent purchaser. It was accordingly *held*, that since the plaintiff's mortgage was never indexed at all, until after the defendants' rights had attached, the record thereof did not impart notice to them.

This is a very strong case; for it did not appear, but that the recorder had done everything required *except* the alphabetical indexing, *including* the entry on the "fair book," at the time of filing the deed. The entries in this "fair book," it will be observed, were not required to be made alphabetically; and the court held that they were only designed to impart notice *temporarily*, while the deed remained on file, and until the record was completed; after which, parties searching the title were entitled to rely on the alphabetical index. The court refer to Sawyer v. Adams, 8 Vt. 172; McLarren v. Thompson, 40 Me. 284, and Handley v. Howe, 22 Me. 560, as favoring the view taken of the law.

In Whalley v. Small, 25 Ia. 184 (which arose under the same statute), the deed was filed for rec-

ord, and had remained in the recorder's office from the date of its filing, but was never recorded, nor indexed. It was held that a subsequent purchaser was not affected with notice, on the authority of Barney v. McCarty.

By the Code of Iowa of 1851, Secs. 1211–1216, it was enacted that "no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder of deeds in the county in which the land lies, *as hereinafter provided.*" The recorder was required to keep "an entry book or index, the pages of which are so divided as to show, in parallel columns, *first*, the grantors; *second*, the grantees; *third*, the time when the instrument is filed; *fourth*, the date of the instrument; *fifth*, the nature of the instrument; *sixth*, the book and page where the record may be found; *seventh*, the description of the lands conveyed; in the manner following." (Here follows the form of an index.) It was further provided that: "The recorder must indorse upon every instrument, properly filed in his office for record, the time and hour it was so filed; and shall further make the entries provided for in the last preceding section," [*i. e.*, in the index] "except the book and page where the record of the instrument may be found; and from that time such entries shall furnish constructive notice to all the world of the rights of the grantee conferred by such instrument. Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose, *after which* he shall complete the entries aforesaid, so as to show the book and page where the record is to be found." It will be noticed that this statute expressly required the entries in the index (except the book and page of record) to be made *forthwith* on filing the deed; and provided that "from *that* time, *such entries* should furnish constructive notice," etc.

In Calvin v. Bowman, 10 Ia. 529, and White v. Hampton, 13 Ia. 259, the recorder, in indexing a mortgage, inserted in the column of the index intended for the description of the land conveyed, simply the words, "see records," without any description. This was held not to vitiate the record as constructive notice. The same was held in Bostwick v. Powers, 12 Ia. 456, where, instead of a description of the property, the words, "certain lots of land" were inserted in the index. In the latter case it was urged that defendant, a subsequent purchaser, had not in fact examined the record, and that, the notice to him, if any, being purely constructive, the statute must be fully complied with to impart such notice. But the court say: "Whether a subsequent purchaser examines the record or not, he is nevertheless affected constructively with such knowledge as the index entries afford; and if their recitals are of such a character as that they would necessarily put a cautious and prudent man upon inquiry, he is bound to make such inquiry, and upon finding one or more incumbrances, shall be held to notice." And they proceed to argue that if defendant had examined the index, and found the entry in question, he could not be excused for not turning to the book and page of the record referred to, to see if the instrument affected the property which he proposed to purchase.

But in Noyes v. Horr, 13 Ia. 570, where, in recording a mortgage covering *two* tracts of land, the recorder entered in the description column of the index the description of only *one* of the tracts, it was held that the record was not notice to a subsequent purchaser as to the omitted tract. And in Breed v. Conley, 14 Ia. 269, where the index entry described the land conveyed as in a wrong section, township and range, but added the words, "for description, see record," the record was also held insufficient to impart notice. And *a fortiori*, when there is a failure to index the instrument at all, the record will be ineffectual as notice. Gwynn v. Turner, 18 Ia. 1.

But in Barney v. Little, 15 Ia. 527 (decided the next day after Barney v. McCarty, and the opinion being also delivered by Dillon, J.), the court went to great lengths to sustain a defective indexing of a mortgage, under the act of 1851, as notice to a subsequent purchaser. In that case it appeared that, notwithstanding the express provisions of the code (stated *supra*) as to the character of the index to be kept by the recorder, no such index, nor *any general* index, was kept as to mortgages in the county in question for several years after the code took effect; that the mortgage in question, though duly recorded at length in the proper record-book, was indexed only in a separate index kept for that particular volume of records, which index specified only the names of mortgagors and mortgagees, and the page of the volume on which each instrument was recorded. It further appeared that, in indexing the mortgage in question, the page was erroneously entered as 596, while the mortgage was in fact recorded on page 546. It will thus be seen, that, besides the omission to keep a *general* index-book (instead of a separate one for each volume of records), which is clearly contemplated by the law, the index in question wholly omitted *three* of the items required to be entered, viz., date of filing, date of instrument and description of property, and gave a fourth and very material one (viz., the page of the record), *incorrectly*. Notwithstanding all this, the court held a subsequent purchaser, who was proved to have had no actual notice, affected with constructive notice. They say (p. 536): "Assuming the instrument to be one which may properly be registered, the law charges him (the subsequent purchaser) with a knowledge of all facts which an ordinarily careful examination of the records would have made him cognizant of. Having thus settled the rule which is to be applied, the court can not avoid the conclusion that, if the appellants in the case under consideration had made an ordinarily diligent, skillful and careful examination of the records, the mortgage in question would have been discovered to them. In the index they find an entry of

a mortgage from their proposed grantor (Little), to Mason, purporting to be recorded on page 596. Turning to that page, they find, indeed, a mortgage to Mason, but from a different grantor. Reading that mortgage, it would be seen that it conveyed different lands from those which their grantor proposed to sell. This would and should provoke careful scrutiny. The index would be again referred to; and it would be seen that the next preceding entry is of a mortgage to the same grantee, on page 582. It would be found that page 596 is placed between 527 and 582, while all the other figures in the whole index, under letter L, ascend in regular numerical order from top to bottom of the page. To a competent examiner it would occur, that it was much more likely that a recorder should mistake a figure than the name of a party. Between the two pages last above-named, viz., at page 546, the mortgage referred to by the index would have been found, duly acknowledged and regularly recorded in its proper place and order."

With deference to the learned court, and to the eminent judge who delivered this opinion, the decision has always seemed to us open to much question, and not to harmonize very well with the companion case of Barney v. McCarty. If the index be held to be an essential part of the record to impart notice (as it unquestionably is under the very special and precise provisions of the Iowa statute), it appears to us that purchasers, examining it, are at least entitled to have the entries therein made correct, as far as they go, so as not actually to mislead and deceive them, or be likely to do so; and that the court went quite far enough in holding (as in Calvin v. Bowman, and Bostwick v. Powers, *ubi supra*), that the mere *omission* of an item required to be entered in the index, such as the particular description of the property, would not vitiate, when the index, so far as it went, was correct and afforded the means to an examiner of infallibly obtaining knowledge of the instrument. But for a court to say *judicially*, when the index contained a gross misleading error, that a careful examiner would certainly have pursued the astute train of reasoning laid down for him in the opinion on the facts of this particular case, and to hold the luckless purchaser *ex post facto* affected with constructive notice for not having done it, appears to be carrying the doctrine altogether too far. Purchasers of lands in this new country are not bound, at their peril, to employ the most skillful and astute lawyers to examine the records for them. They are entitled to a substantial compliance with the plain and explicit requirements of the law, enacted for their benefit, as to what the records shall contain. Otherwise the recording acts, justly regarded as among the most beneficial laws on the statute-book, are converted into a mere trap for the unwary. The learned court, in laying down a line of investigation for the examiner of the title in question in Barney v. Little, reason backward, in the full light of all the facts as disclosed by the record before them. If they had begun at the other end of the inquiry, without previous knowledge of the fact to be ascertained, perhaps they would not have been more successful than the appellants against whom they decided.

J. N. R.

BOND SIGNED ON CONDITION.

STATE OF MISSOURI *EX REL.* v. BAKER.

Supreme Court of Missouri, October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

In an action on an administrator's bond, it is no defense on the part of a surety that he signed the bond on condition that the name of another person should be obtained as co-surety, and that the principal forged the name of such person as surety upon such bond. State v. Palter, 4 Cent. L. J. 85, approved.

Asbury, Cullenden & Cockrell, for defendant in error; *C. E. Moorman*, for plaintiff in error.

Error to Johnson Circuit Court.

SHERWOOD, C. J., delivered the opinion of the court:

It is not necessary to review the action of the court, in refusing to set aside the judgment by default, since we do not regard the matter which the affidavits contain as constituting any defense. The fact that the name of Milly A. McFarland, one of the apparent sureties on the administration bond, was *forged*, or that, when informed of such forgery by the administrator, the principal in the bond, after the acceptance of the bond by the proper officer, she did not inform those who had really signed the bond as sureties of the forgery, can not affect their previously incurred liability, or distinguish this case, in point of principle, from The State v. Potter (decided at the present term and reported 4 Cent. L. J. 85), since in this case, as in that, the bond was complete, and the condition upon which the sureties signed, unknown to the officers, and equally broken; in the former case, by failing to obtain the signature of a certain person as co-surety; in the latter, by a like failure coupled with the forgery of the name of the promised person.

We are unable, therefore, to make any substantial distinction between the two cases, and shall affirm the judgment. All concur.

NOTE.—This case is identical in principle with State v. Potter. The bond was signed by the surety, relying upon the promise of the principal to obtain an additional surety. This the principal failed to do; so far, this and the Potter case are alike. The fact that the principal forged the name of the promised surety, made it no worse for the other surety, than it would have been if the name had been wholly left off. The case would have been wholly different, if the principal had first forged the name of one as surety, and then obtained the signature of another on the faith of it, as was done in Seely v. People, 27 Ill. 173; where it was held that the surety so signing was not bound. This last case was cited by Judge Sherwood in State v. Potter with apparent approval, and it was shown to be entirely in harmony with the doctrine there announced.

A TWENTY years' lawsuit is a rather expensive luxury. About twenty years ago, one Edward Roberts brought a suit against James Hill, in the New York Superior Court for $182 claimed by him to be due for goods sold and delivered. Last week the case came finally for trial, when a verdict was rendered for $2,096.58—principal, costs and interest.

COUNTY WARRANTS.

SHIRK v. PULASKI COUNTY.

United States Circuit Court, Eastern District of Arkansas, April Term, 1877.

Before HON. JOHN F. DILLON, Circuit Judge, and HON. H. C. CALDWELL, District Judge.

1. COUNTY WARRANTS — TRANSFERABILITY.— Warrants issued by counties in Arkansas are not commercial paper free from legal and equitable defenses in the hands of a subsequent holder, but such holder takes them subject to such defenses.

2. WARRANTS ISSUED FOR EXCESSIVE SUM.—Under the legislation of Arkansas, warrants for more than the sum actually due a claimant, in order to make the warrant worth in money the amount of the debt due from the county, are void as to the excess, and may be defended against accordingly. The act of the county authorities in auditing the claim and issuing the warrants is not conclusive as a judicial determination upon the parties.

3. UNDER THE CIRCUMSTANCES the court treated the holders of such warrants as the equitable assignee of the valid legal claim of the payee, or of the holder's proportionate share of such claim where several warrants were issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim.

4. THE STATUTES OF ARKANSAS, as to calling in warrants "in order to cancel, re-issue and classify the same," construed.

The facts sufficiently appear in the opinion of the court.

Mr. Kimball and *Mr. Rose* for the plaintiff; *Mr. Brown* for the defendant.

DILLON, Circuit Judge, CALDWELL District Judge, concurring:

This is an action upon a great number of county warrants issued at various times and of various classes, by the defendant county. Some of these are warrants that were rejected by the county court, under the "calling in" order of April 19, 1875; some are warrants which were not presented under that order; some are warrants presented nnder that order and rejected by the county court; and some of the warrants rejected, and some of the warrants re-issued under that order, were what is popularly known as "five to one" or "ten to one" warrants. Upon consideration of the demurrer to the answer, which has been fully and ably argued on both sides, the court rules the following propositions:

1. That the order of April 19, 1875, made under the act of February 27, 1875, (Laws 1875, p. 189), requiring all outstanding warrants and scrip, issued by the defendant county *prior to October* 30, 1874, to be presented to the county court on or before the 30th day of July, 1875, "in order to cancel, re-issue and classify" the same, was unauthorized and void. Following the decision of the supreme court of the state in Parcel v. Barnes & Bro., 25 Ark. 261, the act of February 27, 1875, above referred to, can only operate on warrants issued *after* that act went into effect. The general law on this subject (Gantt's Digest Laws of Ark., Sec. 614) prohibits such "calling in" orders oftener than once in *three* years. It is admitted on the record that there was a previous call by the defendant in July, 1873, requiring warrants to be presented by the 1st day of October, 1873; and the above-mentioned order of April 19, 1875, was within that period. For these reasons we hold that the order of April 19, 1875, was beyond the authority of the county court and void. We feel more assured of the correctness of this conclusion, since the counsel for both parties conceded that this was the true view; at all events it was not seriously controverted by the learned counsel for the county.

2. It results as a corollary from the foregoing proposition, that the legal rights of the holders of county warrants, issued prior to October, 30, 1874, were in no manner affected by the order of April 19, 1875. All action under it by the connty court was *coram non judice*, and this irrespective of the question as to the effect of the county court not being in session on the 30th day of July, 1875, the time fixed and limited by the "calling in" order for the presentation of the warrants. Therefore, whether the holders of warrants, issued prior to October 30, 1874, failed to present them under the order of April 19, 1875, or presented them and they were rejected, or presented them and received re-issued warrants,—their rights are in no wise affected by what was done under that order. They were not bound to present them under that order; the county, by virtue of that order, had no legal power to reject them; and the warrants re-issued under that order derived no validity from the order of re-issue, which they did not before possess.

3. As to "five to one" or "ten to one" warrants so-called. In many cases the county court (according to the answer, which is to be taken as true on the demurrer), for legal fees to county officers the amount whereof was definitely fixed by statute, and for the support of paupers, and for work and labor in respect of matters which were county charges, issued warrants for five or ten times the legal fees of the officers, or the money or currency value of the support of the paupers or work and labor done for the county.

The reason for this was the depreciation of warrants and the corresponding difference between money and warrants. The statute of this state, at the time the warrants were thus issued, contained the following provisions applicable to this question:

"SEC. 601. It shall be *unlawful* for any board of supervisors to allow any greater sum for any account, claim, demand, or fee-bill against the county, than the amount actually due thereon, *dollar for dollar*, according to the legal or ordinary compensation for services rendered, materials furnished, salaries or fees of officers, or to direct the issuance of county warrants upon such accounts, claims, demands, or fee-bills, for more than the actual amount so allowed, dollar for dollar.

"SEC. 602. Before any account, claim, demand, or fee-bill shall be allowed by any board of supervisors, said board shall require the person or persons, or their legal representatives, claiming the same to be due, to attach to said account, claim, demand, or fee-bill, an affidavit that the same is just and correct, and that no part thereof has been previously paid; that the services charged for, or materials furnished, as the case may be, were actually rendered or furnished, and that the charge made therefor does not exceed the amount allowed by law, or customary charges for similar services or materials, dollar for dollar; which account, claim, demand, or fee-bill, together with the affidavit thereto, shall be filed with the county clerk, and kept in his office for the term of ten years, and the same shall be subject to inspection by any member of the grand jury of the county, at each term of the circuit court, or by the prosecuting attorney of the circuit.

"SEC. 603. In all cases the board of supervisors shall require an itemized account of any claim presented to them for allowance, sworn to as required by the preceding section, and may in all cases require satisfactory evidence, in addition thereto, of the correctness of the account, and may examine the parties and witnesses on oath touching the same, and shall have power to compel the production of all books, accounts, papers or

documents which may be necessary in the investigation of any matter coming properly before them and within their jurisdiction.

SEC. 604. Boards of supervisors are hereby prohibited from auditing and allowing to any officer any fee or allowance not specifically allowed such officer by law; and in no case shall constructive fees be allowed to or paid officers by any county of this state.

"SEC. 605. Whenever any allowance shall be made by a board of supervisors, and an order therefor entered upon the records, the county clerk shall, when requested by the person in whose favor such allowance has been made, issue a warrant for the amount of such allowance, which warrant shall be in the following form:" (Here follows the form of the warrant.)

It is our opinion that the effect of this legislation is to prohibit the county from issuing a warrant for any greater sum, than such sum as would pay "the amount actually due" the creditor in money, "dollar for dollar;" a dollar in warrants for each 100 cents of his demand.

It is probable that even without such direct prohibition the county court, unless expressly authorized, would have no such power. And so the point has been adjudged. Foster v. Coleman, 10 Cal. 278.

4. It is insisted, however, by the warrant-holder that the auditing of claims by the county court or by its predecessor, the board of supervisors, and the issuing of a warrant for the amount found due a claimant, is a *judicial act and a judicial determination* of the question of the county's liability, which is binding on both the claimant and the county, unless reversed on appeal or set aside in some direct manner; and as a consequence, that the liability of the county on warrants, or the consideration therefor, can not be inquired into collaterally or by way of defense to an action on the warrants.

The statute of this state gives the county court power "to audit, settle, and direct the payment of all just demands against the county." (Gantt's Dig., Sec. 595). The claimant may appeal from the allowance or refusal to allow, but it has been decided that the county can not. Chicot Co. v. Tilghman, 26 Ark. 461.

There is nothing peculiar in the legislation of Arkansas in the matter of auditing claims and issuing warrants therefor; and it has been decided in many states, and repeatedly, that such settlements have not the force of judicial judgments which estop or conclude either the claimant or the county.

Among the many cases on this subject, the following are cited as directly in point. Webster County v. Taylor, 19 Iowa, 117, 120 and cases cited; Clark v. Des Moines, 19 Iowa, 199; Clark v. Polk Co., 19 Iowa, 248; School Dist. v. Lombard, 2 Dillon C. C. 493; Keller v. Leavenworth Co., 6 Kas. 510; Goodnow v. Ramsey Co., 11 Minn. 31; Dillon, Munic. Corp., Sec. 412 and cases cited; The Mayor of Nashville v. Ray, 19 Wall. 468, 477. Many more cases might be cited, but it is hardly necessary. The true rule is this: Within the limits of their power as conferred by statute, the action of the county court in determining the amount due a creditor of the county in the absence of fraud or, perhaps, mistake, binds the county; but the county court can not bind the county by ordering a claim to be paid which is not made a county charge by statute, or by allowing more than the statute distinctly limits, or by an allowance in the face of a statute prohibition.

Any other principle would ruin municipalities and counties; and the danger which would result from it is well exemplified in this case, where ten dollars have been allowed for one, and where it is said the officers of the defendant county have in this manner issued $400,000 of warrants within a few years, which are yet outstanding.

5. This practice having so long obtained, and these warrants having been issued and passed freely into circulation without objection, they are, doubtless, in many cases in the hands of parties who have received them for value in good faith. Each holder is the equitable assignee of the valid, legal claim of the payee or of the holder's proportionate share of such claim, where several warrants have been issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim.

We have some doubt as to whether the holder of these "five to one" or "ten to one" warrants can recover on them even thus far; but under the circumstances we see no injustice which a recovery to this extent and subject to these limitations can work to the county; and it is but just to the present holders of the warrants who may have taken them in good faith and for value;—a result which would have been avoided, if the county or the people had promptly stopped, as they ought, *this bad business*.

Wherever the original claimant could have recovered against the county, there is no inconsistency in subrogating the holder of warrants issued for such a claim to the rights of the payee. And such a principle was in reality adopted in School Dist. v. Lombard, 2 Dillon C. C. 493, by Mr. Justice Miller; for there is no substantial difference in the rights of the parties, whether the county files a bill in equity to cancel a warrant for illegality, or is allowed for that reason to make a defense thereto.

A judgment on the demurrer to the answer will be entered in conformity with these views.

JUDGMENT ACCORDINGLY.

MARRIAGE — CONFLICT OF LAWS—BONA FIDE DOMICILE.

STATE v. KENNEDY *ET AL.**

Supreme Court of North Carolina, January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE, }
" W. B. RODMAN, } Associate Justices.
" W. P. BYNUM, }
" W. T. FAIRCLOTH, }

Although a marriage between a negro and a white person is allowed in South Carolina, and although such a marriage is there entered into according to the formalities of that law, yet if it be between parties then domiciled in North Carolina, who went into South Carolina to contract such a relation in evasion of the laws of North Carolina, which declare such a marriage void, it will be held void in the latter state.

This was a criminal action for fornication and adultery. The cohabiting was admitted and a special verdict found, that in 1873, while both defendants were domiciled in North Carolina, they, with intent to evade the laws of North Carolina forbidding the intermarriage of whites and blacks, were married in South Carolina, according to the forms of the law of that state, and that such a marriage was not prohibited by that law; then they returned to the state of North Carolina.

Upon this verdict, his honor in the court below, Judge Schenck, rendered judgment for the state, and the defendants appealed.

Attorney-general Kenan, for the state. *Jno. L. Bailey, Jr.* (with whom were *Shipp & Bailey*), for the defendants, cited: 1 Bish. on M. & D., §§ 371-389; Med-

* For the report of this and the following case we are indebted to W. H. Bailey, Esq., Charlotte, N. C.

way v. Needham, 16 Mass. 157; Stevenson v. Gray, 17 B. Mon. (Ky.) 193.

RODMAN, J., delivered the opinion of the court:

The defendants in this case were domiciled in North Carolina before and at the time of their marriage in South Carolina, to which state they went for the purpose of evading the law of North Carolina which prohibited their marriage, and they immediately after the marriage returned to North Carolina, where they have since continued to reside.

To quote from the opinion of Lord Cranworth, in Brook v. Brook, 9 H. L. 193: "There can be no doubt of the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry; and the consequences of their marrying." It is not necessary to say that a marriage, contracted in another state between residents of this state without the rites and ceremonies required in this state, will be void, even though the parties left this state for the purpose of evading those rites. Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 416. As to the formalities of the marriage, the *lex loci* will govern.

But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go, so long as they remain domiciled in North Carolina.

And we conceive that it is immaterial whether they left the state with the intent to evade its law or not, if they had not *bona fide* acquired a domicile elsewhere at the time of their marriage. Story Confl. of Laws, § 65; Williams v. Oates, 5 Ire. 535. In Brook v. Brook, above cited, Lord Campbell says: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, as contrary to religion or to morality, or to any of its fundamental institutions."

In that case an Englishman casually met in Denmark the sister of his deceased wife, and married her there. As such marriages are prohibited between English subjects, it was held void.

A law like this of ours would be very idle, if it could be avoided by merely stepping over an imaginary line.

There are cases to the contrary of this conclusion, decided by courts for which we have great respect. They are cited, and the whole question is learnedly and earnestly discussed by Bishop, 1 Mar. and Div. § 371-389; Medway v. Needham, 16 Mass. 157; Stevenson v. Gray, 17 B. Mon. (Ky.) 193.

It seems to us, however, that when it is conceded, as it is, that a state may, by legislation, extend her law prescribing incapacities for contracting marriage over her own citizens, who contract marriage in other countries by whose law no such incapacities exist, as Massachusetts did after the decision in Medway v. Needham, the main question is conceded, and what remains is of little importance. Nothing remains but the question of legislative intent, to be collected from the statute. About the intent in this case we have no doubt.

Per curiam.

There is no error. Let this opinion be certified.

MARRIAGE — CONFLICT OF LAWS—BONA FIDE DOMICILE.

STATE v. ROSS *ET AL.*

Supreme Court of North Carolina, January Term, 1877.

A marriage contracted in South Carolina according to the forms of her laws and not prohibited by them, between a negro and a white person domiciled there, will be held valid in North Carolina when such persons remove into the latter state, notwithstanding that such a marriage is in terms declared void by a statute of North Carolina.

This was a criminal action for fornication and adultery, tried before his honor, Judge Schenck, at August term, 1876, of the Superior Court of Mecklenburg County.

Under the direction of his honor, the following special verdict was found, namely: Pink Ross is a negro man and Sarah Ross a white woman. Pink Ross is a native of South Carolina, and resided there until August, 1873. Sarah Ross was a resident and citizen of North Carolina up to the time of the marriage between herself and the other defendant. In May, 1873, the defendant, Sarah Ross, then Sarah Spake, went to Spartanburg, S. C., for the purpose of marrying the other defendant, and with the intention of evading the laws of North Carolina prohibiting marriages between persons of color and white persons.

The defendants were married in South Carolina, according to the laws of that state, in May, 1873. They lived in that state until August, 1873, as man and wife, when they removed to Charlotte, N. C.

It is argued by the counsel for the state, and the court finds as a fact, that the law of South Carolina does not forbid marriages between white persons and persons of color.

It is admitted that, after their coming to North Carolina, they bedded and cohabited together as man and wife, within two years before the finding of the bill of indictment in the case.

Upon consideration whereof, his honor, being of opinion with the defendants, rendered judgment accordingly, from which ruling the solicitor for the state appealed.

Attorney-general Kenan, for the state; *J. L. Bailey, Jr.* (with whom were *Shipp & Bailey*), for the appellees.

1. Marriage must be everywhere deemed to be constituted, when it is constituted by the law of the domicile. There can not be a question about it. 1 Bishop on M. & D. § 355; State v. Patterson, 2 Ire. L.; Morgan v. McGhee, 5 Humph. (Tenn.) 13, as to Indians.

2. His honor finds the law of South Carolina to be the same as to marriage, as that declared in the celebrated opinion of Lord Stowell. Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 416.

3. The right of persons to migrate, carrying with them the marital relations legally formed in the country whence they remove, has always been recognized by the comity of nations; but in these United States, as between the states, such right no longer rests in comity, but is enforced as one of the guarantees of American citizenship. Const. U. S. art. 4, sec. 2 (1).

RODMAN, J., delivered the opinion of the court:

The defendants were indicted for fornication and adultery, in living and cohabiting together without being lawfully married. The cohabitation is admitted. Their defense is that they were lawfully married.

The facts found by the special verdict are these: The defendant, Pink Ross, is a negro man, and the defendant, Sarah, a white woman. Pink Ross is a native of South Carolina, and resided there until August, 1873. Sarah Ross was a resident and citizen of North Carolina up to the time of the marriage between herself and the other defendant. In May, 1873, the defendant, Sarah Ross (then Sarah Spake), went to Spartanburg, South Carolina, for the purpose of marrying the other defendant, and with the intention of evading the laws of North Carolina, prohibiting marriages between persons of color and white persons. The defendants were married in South Carolina, according to

the laws of that state, in May, 1873. They lived in that state until August, 1873, as man and wife, when they moved to Charlotte, North Carolina. The laws of South Carolina do not forbid marriage between white persons and persons of color. On this verdict the judge held that the defendants were not guilty, and the state appealed.

It will be observed that the verdict states that Sarah went to South Carolina with the intent to evade the laws of North Carolina prohibiting the marriage of a negro with a white person. It does not say that she had an intent to return with her husband and live in this state.

It is difficult to see how, in going to South Carolina to marry a negro, without an intent to return to this state, she could evade or intend to evade the laws of this state. Our laws have no extra-territorial operation, and do not attempt to prohibit the marriage in South Carolina between blacks and whites domiciled in that state. Such a case differs essentially from one in which both persons, being domiciled in North Carolina, leave the state for the purpose of contracting a marriage forbidden by its law, and with an intent to return to and reside within North Carolina after such marriage; and also from one in which the man alone leaves this state for that purpose and with that intent.

By the marriage of Sarah the domicile of her husband became hers; and we must suppose that his domicile was *bona fide* in South Carolina, until they moved to this state in August, 1873. It does not appear that any change of domicile was thought of before that time. We must put out of view, therefore, the supposed intent to evade the law of North Carolina, as a conclusion of law, unsupported by or repugnant to the facts found in the verdict, and consider the case as if both parties had been domiciled in South Carolina at the time of the marriage.

It is clear that, upon the marriage, the domicile of the husband became that of the wife, and for that purpose it would be immaterial whether the marriage took place in the state of the husband or in any other state. Story Conflt. Laws, §§ 194–199. It was so held by this court in Hicks v. Skinner, 71 N. C. 539; s. c. 72 N. C. 1. In Warrender v. Warrender, 9 Bligh R. 89 (s. c. 2, Clark & Finnelly, 488), a man domiciled in Scotland married an English woman in England, and it was held that the matrimonial domicile was Scotland. This view seems to have been overlooked, as it is not alluded to in Williams v. Oates, 5 Ire. 535, which is, therefore, apparently opposed to our opinion on this point. But the judgment of the court may be sustained on the ground that the marriage in question then was not shown to be valid in South Carolina.

The question thus presented is an important one. The State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy, as tending to degrade them both. It has therefore declared such marriages void. It is needless to say that the members of this court share that opinion. For that reason it becomes us to be careful not to be unduly influenced by it in ascertaining—not what the law of North Carolina is upon such marriages, contracted within her limits—that is found in the act of assembly, and is beyond doubt—but, what the law of North Carolina is upon the question presented; and for that we must look beyond the statute of the state.

If we are right in our conception of the question presented, to wit, whether a marriage in South Carolina between a black man and a white woman, *bona fide* domiciled there, and valid by the law of that state, must be regarded as valid in this state when the parties afterwards migrate here,—we think that the decided weight of English and American authority requires us to hold that the relation, thus lawful in its inception, continues to be lawful here. We know of but two cases which appear to be to the contrary, which will be found in 10 La. An. 411, and 15 *Ib.* 342. Mr. Bishop, in noticing the first of these two cases, has thought it fit to speak of the people, whose court decided them, in a tone not to have been expected from a philosophical jurist. *Telum imbelle.*

The general rule is admitted, that a marriage between citizens of a foreign state, contracted in that state and valid by its laws, is valid everywhere where the parties may migrate, although not contracted with the rites required by the law of the country into which they come, and though between persons disqualified by such law from intermarrying. Williams v. Oates, 5 Ire. 535; Brook v. Brook, 9 H. L. 193; Story Confl. of Laws, § 81–113; Dalrymple v. Dalrymple, 2 Hagg. Consist. R. 416. It is contended, however, by the attorney-general, that there are exceptions to this rule, as well established as the rule itself, viz., that incestuous and polygamous marriages, although lawful in the country in which they are contracted, will not be recognized in other states, in which such marriages are deemed immoral and are prohibited. And it is further argued that a marriage between persons of different races is as unnatural and revolting as an incestuous one, and is declared void by the laws of North Carolina.

The exception certainly exists, notwithstanding a *dictum* of a very great judge to the contrary, in Williams v. Oates, 5 Ire. 535.

Story (§ 113 *a.*) says: "The most prominent, if not the only known, exceptions to the rule are those marriages involving polygamy and incest; those positively prohibited by the public laws of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country."

On examining the illustrations of these exceptions, given by the author, it will be seen that they are considerably limited.

Thus all christian countries agree, that marriages in the direct line and between the nearest collaterals are incestuous, and that polygamy is unlawful. Consequently such marriages will be held null everywhere, because they were null in the place of the contract. But beyond these few cases, in which all the states agree, there is a difference as to what marriages are incestuous; and in such cases the admitted international law leaves it to each state to say what is incestuous in respect to its own subjects. In England, a marriage with the sister of a deceased wife is held incestuous, and between persons domiciled in England it will be held void, wherever contracted. Brook v. Brook, 9 H. L. 193. But it does not follow that such a marriage, contracted in a state where it was lawful, between subjects of that state, would be held void in England if the parties afterwards became domiciled there. There is no reason to think it would be. Story, § 116, 116 *a.* Still stronger are the illustrations given in §§ 95, 96.

However revolting to us and to all persons who, by reason of living in states where the two races are nearly equal in number, have an experience of the consequences of matrimonial connections between them, such a marriage may appear, such can not be said to be the common sentiment of the civilized and christian world. When Massachusetts held such a number of negroes as to make the validity of such marriages a question of practical importance, her sentiments and her legislation were such as ours are to-day. Medway v. Needham, 16 Mass. 157. Now, since she has got rid

of her negroes, and the question is of no practical importance to her, as far as can be gathered from her statute books, she considers such marriages objectionable.

Most of the states of the Union and of the nations of Europe, with whom the question is merely speculative, take a similar view of it. It is impossible to identify this case with that of an incestuous or polygamous marriage, admitted to be such *jure gentium*.

The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister states. We are compelled to say that this marriage, being valid in the state where the parties were *bona fide* domiciled at the time of the contract, must be regarded as subsisting after their immigration here. The inconveniences which may arise from this view of the law are less than those which would result from a different one.

The children of such a marriage, if born in South Carolina, could migrate here and would be considered legitimate. The only evil which could be avoided by the contrary conclusion is that the people of this state might be spared the bad example of an unnatural and immoral, but lawful, cohabitation. The inconveniences on the other side are numerous and are forcibly stated in Scrimshire v. Scrimshire, 2 Hagg. Consist. R. 417, and in Story, § 121: "And, therefore, all nations have consented, or are presumed to consent, for the common benefit and advantages, that such marriages shall be good or not, according to the law of the country where they are celebrated."

Upon this question, above all others, it is desirable (altering somewhat the language of Cicero, with which Story concludes his great work) that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.

Per curiam.

There is no error in the judgment below. Let this opinion be certified. READE and BYNUM, JJ., dissent.

STATUTORY FORECLOSURES OF MORTGAGES.

MOWRY v. SANBORN.

New York Court of Appeals, January, 1877.

HON. SANFORD E. CHURCH, Chief Judge.
" WM. F. ALLEN,
" CHARLES ANDREWS,
" ROBERT EARL,
" CHARLES J. FOLGER,
" CHARLES A. RAPALLO,
" THEODORE MILLER,
} Associate Judges.

1. STATUTORY FORECLOSURE — PROOF OF SERVICE OF NOTICE.—Sections 3, 9, and 10 of the Revised Statutes of New York, relating to statutory foreclosures of mortgages, provide for the doing of certain acts and the making of certain *designated* affidavits as equivalent to a deed from the mortgagee to the purchaser under the power of sale. Section 14 provides that, when the mortgagee becomes the purchaser, *such* affidavits shall be evidence of the sale and foreclosure of the equity of redemption as herein specified, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee upon a sale to a third person. An amendment to section 3 requires, in addition, the service of notice of foreclosure upon the mortgagor; but section 14 was not amended so as to make an affidavit of such service one of the affidavits required as equivalent to a deed. In ejectment, founded upon a statutory foreclosure, *held*, that oral, common-law proof of service of the requisite notice upon the mortgagor was proper, and it was not *necessary* to prove the same by affidavit.

2. FORECLOSURE FOR GREATER SUM THAN NAMED IN THE MORTGAGE.—The mortgage secured the payment of commercial paper of the mortgagor, held by the mortgagee, but provided further, that it should not be a security for over $3,000 at any time; *held*, that a foreclosure for $4,845.35 was within the power, if the $3,000 principal and the interest thereon at the time of the foreclosure amounted to $4,845.35.

3. THE NOTICE OF SALE stated that the sale would be the 18th day of July *next*. It was erroneously dated in 1868 instead of 1868; *held*, not to invalidate the sale.

This was an appeal by the plaintiffs, from a judgment of the general term of the supreme court in the third department affirming a judgment at the circuit, on trial by the court without a jury, on which the court rendered judgment for the defendant.

The action was ejectment. The complaint alleged that the plaintiffs "are the owners in fee and entitled to the full and undisturbed possession of certain lands and premises situated in the village of Sandy Hill. That defendant is in possession of said premises, and wrongfully and unlawfully withholds the possession of said premises from these plaintiffs." The amended answer admitted "that the defendant is in possession of the lands intended to be described in said complaint," and denies "each and every other allegation in said complaint contained."

The cause was tried at circuit in 1871, before Mr. Justice James, and judgment was ordered in favor of plaintiffs. Defendant appealed to the general term, and judgment was affirmed. Defendant appealed to the court of appeals, and the cause was transferred to the commission of appeals. That court reversed the judgment and ordered a new trial, on the ground that the affidavit of service of notice of the mortgage foreclosure, on the mortgagor hereafter stated, was defective. On the second trial the plaintiffs gave in evidence a deed from George Bradley to defendant in 1852, of lands including premises described in the complaint. Also:

1. A bond by defendant to the Washington County Bank, dated July 7, 1857, conditioned that the defendant "shall, and do well and truly pay, or cause to be paid unto the above-mentioned Leroy Mowry, president of the Washington County Bank, or to his certain attorney, successor, successors or assigns, the notes, drafts, or other commercial paper of the said Jesse K. Sanborn, or on which his name appears as maker, drawer or indorser, now held and owned by said Washington County Bank, and shall also pay any notes, drafts, or other commercial paper of said Sanborn, or on which his name shall appear as maker, drawer or indorser, which shall be hereafter discounted, held or owned by said Washington County Bank. *But this bond is not to be security for over three thousand dollars at any one time*, and is not to extend to any paper received or discounted after three years from the date of this bond."

2. A mortgage of same date as the bond, from defendant and wife to said bank, of the premises described in deed from Bradley to defendant, with same condition as the bond.

3. Affidavits on foreclosure, by advertisement of said mortgage, the notice of sale, claiming as due thereon $4,845.35 at time of publishing the notice, showing sale on 18th day of July, 1868, and premises bid in by the Washington County National Bank for $5,010. No copy of the notice of sale was attached to any of the affidavits, except the affidavit of publication. The defendant objected to the reception of the affidavits in evidence, on the ground that the affidavit of service of the notice of sale on the mortgagor was not sufficient, stating that he resided at the place to which it was mailed, on information and belief only.

Plaintiffs offered to prove by parol evidence that the mortgagors resided at Sandy Hill at the time of the service of notice of foreclosure; which evidence was received under objections of defendant.

4. Plaintiffs then gave in evidence deed from the Washington County National Bank of Greenwich to plaintiffs, dated December 19, 1870, and recorded in Washington County clerk's office, December 26, 1870.

Plaintiffs rested and defendant moved for a nonsuit, on various grounds, which was denied. Defendant excepted.

Defendant gave in evidence the original notice of sale affixed in the book kept by the Washington County clerk. Notice same as in affidavits, except it was dated April 23, 1858, and was affixed April 24, 1868. Defendant gave in evidence the People's Journal of dates of April 26 and 30, and May 7 and 14, 1868, in which notice of sale and foreclosure was published, in which the notice was dated April 23, 1858, and stated that the "mortgage will be foreclosed by a sale of the premises therein described, at a public auction, at the hotel now kept by Lodowich Bulsom in the town of Greenwich, in said County of Washington, on the 18th day of July *next*, at one o'clock in the afternoon of that day." Also issue of said paper of June 25, 1868, in which paper no notice was published.

The foregoing was all the evidence given on the trial. The defendant moved for judgment on grounds previously stated. The motion was denied, and defendant excepted. The court, on final decision, held defendant was entitled to judgment. Judgment was entered accordingly. Plaintiffs appealed to the general term, where the judgment was affirmed (7 Hun, 380), and they appealed to this court.

Section 3 of the Revised Statutes, as originally passed, provided for a foreclosure by publication and posting a notice of foreclosure. In 1844 this section was amended so as to require in addition the service of a notice of the foreclosure upon the mortgagor.

By § 8, "every sale pursuant to a power as aforesaid, and conducted as herein prescribed, hereafter made to a purchaser in good faith, shall be equivalent to a foreclosure and sale, and under the decree of a court of equity, so far only as to be an entire bar of all equity of redemption of the mortgagors," etc.

By § 9, "an affidavit of the fact of any sale, pursuant to such notice, may be made by the person who officiated as auctioneer at such sale, stating the time and place at which the same took place, the sum bid, the name of the purchaser, and shall be annexed to a printed copy of the notice of sale."

By § 10, "an affidavit of the publication of such a notice of sale, and of any notice of postponement, may be made by the printer of the newspaper in which the same was inserted, or by his foreman or principal clerk; and an affidavit of the affixing a copy of such notice on the outward door of the court-house may be made by the person who affixed the same, or by any other person who saw such notice so posted during the time required; and an affidavit of the affixing a copy of such notice in the said books, so to be provided and kept by the clerk pursuant to the first section of this act, may be made by the county clerk, or by any other person who saw such notice so affixed during the time required; *and an affidavit of the serving a copy of such notice on the persons entitled to service thereof may be made by the* persons who served the same." (Section 10, as amended in 1844, p. 530, § 2, by adding words in italics.)

"§ 12. *Such* affidavits shall be recorded at length by such clerk in a book kept for the record of mortgages; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.

The statute only authorizes the foreclosure, by advertisement, of a mortgage containing a *power of sale* by the mortgagor. 2 R. S. 545, § 1; 2 Edm. St. 564. Prior to the Revised Statutes upon foreclosure, a deed by the mortgagee to the purchaser was *necessary* in order to a proper execution of the *power of sale*, and to vest title, under the foreclosure, in the purchaser. Arnott v. McClure, 4 Denio, 44.

Section 14, as originally passed, provided (2 R. S., 1st ed., 547): "§ 14. When the mortgaged premises, or any part of them, shall have been purchased at such sale by the mortgagee, his legal representatives, or his or their assigns, as hereinbefore provided, the affidavits of the publication and affixing notice of sale, and of the circumstances of such sale, shall be evidence of the sale and of the foreclosure of the equity of redemption as herein specified, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee upon such sale to a third person." In speaking of section 14, the revisers, in their notes, say (5 Edm. St. 764): "As the statute authorizes the mortgagee to become a purchaser, and as he can not execute a deed to himself, it has often excited inquiries and doubts respecting *the evidence* of title acquired under such a purchase. The above section is prepared to remove those doubts, and declare the law as it is now understood." Where a person other than the owner of the mortgage became the purchaser, a deed to the purchaser by the person foreclosing was still held to be necessary. To render the proceedings uniform, in 1838, section 14 was amended (Laws 1838, ch. 266, § 8, p. 263), so as to read as follows: "§ 14. Whenever the mortgaged premises, or any part of them, shall have been purchased at such sale by the mortgagee, his legal representatives, or his or their assigns, *or by any other person or persons whatsoever*, as hereinbefore provided, the affidavits of the publication and affixing notice of sale, and of the circumstances of such sale, shall be evidence of the sale and of the foreclosure of the equity of redemption, as heretofore specified, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee upon such sale to a third person *hath heretofore been*." The amendments are in italics.

Samuel Hand, for appellant; *Nathaniel C. Moak*, for respondent.

ANDREWS, J., delivered the opinion of the court:

This action has been twice tried. On the first trial the plaintiff recovered on proving title in Sanborn; a mortgage from him to the Washington County Bank, July 7th, 1856; its assignment to the Washington County National Bank; the affidavits in the foreclosure proceeding; a deed from the bank (the purchaser on the mortgage sale) to the plaintiff, and that the defendant was in possession of the premises. The plaintiff, upon this proof, maintained his right of action, provided the affidavits showed a compliance with the statute relating to the foreclosure of mortgages by advertisement.

The judgment on the first trial was reversed by the commission of appeals, on the ground that the affidavit of service of the notice of sale upon the mortgagor and others did not show that service had been made as required by the statute. The affidavit was made by the attorney who conducted the foreclosure, and it alleged a service by mail upon the mortgagor and other persons of the notice of sale, by depositing notices in the post-office, addressed to the persons named at the places mentioned, and that at the time "each of the said persons resided, as the deponent is informed and believes, at the respective places to which the said notices were so addressed."

The notice to the mortgagor was, as appears by the affidavit, mailed at Greenwich, directed to him at Sandy Hill, and the only evidence that he resided there, given on the former trial, was the statement in the affidavit made upon the information and belief of the affiant.

The commission of appeals (Earl, Com., dissenting), held that this was not competent or legal evidence of the fact, and that the case stood without proof that notice of sale had been served on the mortgagor, and consequently that the plaintiff had failed to establish a valid foreclosure of the mortgage.

On the last trial the judge permitted oral evidence to be given, that the mortgagor resided at Sandy Hill, where the notice mentioned in the affidavit was mailed, and the judge found as a fact that he then resided at that place; but on the final decision of the case, he disregarded this evidence, and refused to consider it, on the ground that oral evidence of the residence of the mortgagor was not admissible to establish the regularity of the foreclosure, or to supply the defect in the affidavit of service, and judgment was given for the defendant, which was affirmed by the general term, and is now before us for review. The principal question in the case is the one already suggested, viz.: Was evidence admissible to prove that the mortgagor resided at Sandy Hill, when the notice was mailed? Or the question involved is still more comprehensive, viz.: When title is claimed under the foreclosure of a mortgage by advertisement, may the fact of the service of notice of sale upon the martgagor or other persons affected by the proceedings be shown in support of the title by any competent common-law evidence, in the absence of an affidavit showing such service? The right of a mortgagee to extinguish the equity of redemption by a sale of the land, without judicial proceedings or the decree of the court, depends upon the existence of a power of sale in the mortgage or other instrument executed by the mortgagor. If a power of sale is not given, the mortgagee must resort to a court of equity to enforce the mortgage. This principle of the common law has been retained in the statute for the foreclosure of mortgages by advertisement, which only authorizes this proceeding in cases where the mortgage contains a power of sale. 2 Rev. St. 545, § 1.

In the absence of a statute regulating the mode of executing the power, the mortgagee may sell the land at public or private sale, unless the particular manner of sale is prescribed by the instrument creating the power (Davey v. Durrant, 1 De Gex and J. 535; 2 Wash. on Real Prop. 77), in which case the mortgagee must, in executing the power, conform to the conditions imposed. The mortgagee could not, at common law, become the purchaser on a sale made by himself under the power; or, at least, such a sale was voidable at the election of the mortgagor. He could not, at the same time, be a trustee of the power of sale, and a purchaser under it (1 Sug. on Vend. 94; 3 *Id.* 229; Wash. on Real Prop. 77); and, where a sale was made under the power, a deed from the mortgagee to the purchaser was necessary to pass the title. Arnot v. McClure, 4 Den. 44.

The mortgagee, under the law of England, has the legal title to the mortgaged premises, and under our law it remains in the mortgagor under foreclosure; but in either case a deed is necessary to satisfy the statute of frauds, and to vest the title in the purchaser, unless, indeed, the legislature has interfered and created an exception, or has substituted some other evidence of title in place of a common-law conveyance.

When a power of sale is given to be executed under certain conditions or its execution is made by the terms of the power to depend upon the performance of precedent acts, and the validity of a conveyance made in assumed execution of the power is in question, oral evidence of a compliance with the conditions is admissible, unless such proof is excluded by the nature of the conditions imposed, or the terms of the power.

In Hawley v. Bennett, 5 Paige, 104, entries in the register of an attorney, who conducted a foreclosure by advertisement, were admitted after his death in support of the title under a deed given on the foreclosure, to show a compliance with the statute and the circumstances of the sale. The foreclosure was before the statute of 1808, which made affidavits of the parties, etc., *prima facie* evidence; and, in Arnot v. McClure, Bronson, C. J., says: "Before we had any such statute, the regularity of the proceedings could only be established by common-law evidence; and any kind of common-law evidence was admissible."

When title to real estate is claimed under a conveyance purporting to be made in execution of a power which, by its terms, is to be exercised in a certain event, or after notice to the grantor or third persons, or the doing of any other act by the grantee of the power, oral evidence of the happening of the event, or of the performance of the condition precedent, does not add to vary or contradict the deed, but is consistent with it, and is admissible to show that the grantee of the power acted within his authority.

The statute for the foreclosure of mortgages by advertisement was passed to regulate the mode of executing the power of sale when given in the mortgage. The statute, as originally enacted, provided for notice of sale to be given by publication and posting (1 R. S. 376), and in 1844 the statute was amended by requiring, in addition, that the notice should be served personally or by mail on the mortgagor (Laws of 1844, ch. 346, § 5); and in 1857 the statute was further amended by providing that a copy of the notice should be delivered to the county clerk, to be affixed in a book in his office, and that an entry of the time of receiving and affixing it should be made. Laws of 1857, ch. 308. All these several acts required to be done were parts of the notice to be given, and were to be performed prior to the sale, at the times specified in the statute. These statute requirements were conditions precedent to a valid sale under the power, and have the same effect as if they were inserted in the mortgage; and a person claiming title under a statute foreclosure assumes the burden of showing that they were performed. But, unless the statute has otherwise provided, it seems not to admit of doubt that the publication, posting, and service of notice on the mortgagor and other persons, can be proved by oral testimony; in fact this would usually be the only available proof. The legislature, by an act passed in April, 1808, first made the affidavits of the printer, etc., *prima facie* evidence, when recorded, of the publication and posting of the notice of sale, and of the circumstances of the sale. This was an innovation upon the common-law rules of evidence, and the object of the statute was to enable the purchaser to perpetuate the evidence of the facts upon which the validity of the sale depended. The same statute authorized the mortgagee to purchase, and both of the provisions referred to were embodied in the act concerning mortgages (Laws of 1813, ch. 22). 1 R. S. 374, §§ 7-10. The sixth section of that act contemplates that a deed should be given to the purchaser on the sale; and, until the act of 1838, which will be hereafter referred to, this was necessary to pass the title, except where the mortgagee was the purchaser. In that case no deed could be given, as the mortgagee could not convey to himself; but, as the statute expressly recog-

nized his right to purchase, and made no provision for a conveyance, the court held, in Jackson v. Calder, 4 Cow. 266, that, on a purchase by the mortgagee, the title passed, by force of the statute, without a deed. Some effect appears to have been given to the fact that affidavits had been made and recorded, showing a sale to the mortgagee.

In the revision of 1830 an entirely new provision was inserted in the statute, being section 12, now section 14, for the purpose, as the revisers say, of removing doubts which had been excited respecting the evidence of title acquired on a purchase by a mortgagee, and to "declare the law as now understood" (5th ed., St. 764). That section, as originally passed, provided that, when the mortgaged premises were purchased on the sale by the mortgagee, his legal representatives or assigns, "the affidavits of the publication and affixing notice of sale, and of the circumstances of the sale, shall be evidence of the sale and of the foreclosure of the equity of redemption, as herein specified, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee upon such sale to a third person."

This section came under the consideration of the court in Arnot v. McClure. In that case the assignee of a mortgage foreclosed it under the statute and became the purchaser; and affidavits of publication and posting of the notice, and of the circumstances of the sale, were made and recorded. In the affidavit of the circumstances of the sale, the boundaries of the property sold, as therein given, did not embrace a portion of the mortgaged premises, and oral proof was offered to show that in fact the whole premises were sold, and that the portion not embraced in the description in the affidavit was by mistake omitted therefrom. The proof was rejected on the trial, and on appeal the ruling was affirmed. The court held, in an opinion by Bronson, C. J., that affidavits were necessary to complete the title when the mortgagee or his assignee was the purchaser on the foreclosure; that in that case, as no deed could be given, the affidavits were, by the true construction of section 14, to have the force and effect of a conveyance by the mortgagee to a third person, "and to perform the double office of proving the regularity of the proceedings of foreclosure, and standing as a conveyance to the purchaser;" and from these provisions the conclusion was reached that the mortgagee or his assignee could not be permitted by oral proof to contradict, impeach, or supply an omission or defect in the affidavits, "any more than he could a conveyance by deed." Section 14 was an important addition to the previous law, as construed in Arnot v. McClure. It resolved the doubt that existed under the statute as it previously stood, and affirmed the general policy of the law, which does not permit a title to real estate to pass without a conveyance in writing, by declaring that the affidavits mentioned should, when the mortgagee became the purchaser, stand for a conveyance of the land. This section was amended in 1838, by allowing a substitution of the affidavits specified therein, in all cases, in place of a deed; but, when the purchaser was a third person, a deed might still be given, and the title supported by oral proof of a compliance with the provisions of the statute. Arnot v. McClure.

In the case now before us, the assignee of the Sanborn mortgage became the purchaser on the foreclosure. Affidavits of the publication and posting of the notice of sale, and of the circumstances of the sale, were made and recorded, and were produced on the trial, together with the affidavit of notice of service on the mortgagor, which the Commission of Appeals decided to be defective in the respect before mentioned. It is very clear, I think, that oral proof was admissible to establish the omitted fact, viz., that the mortgagor, when the notice was served, resided at Sandy Hill, unless the affidavit of service was a part of the statute conveyance provided for in section 14. It can not be so held, unless we can incorporate into that section, with the other affidavits mentioned, the affidavit of service which was first provided for in 1844; and, if this can be done, the affidavit of affixing the notice in the books of the county clerk, provided for by the act of 1857, must also be deemed included. Neither of these affidavits is specified in the section. If, when section 14 was passed, notice had been required to be served on the mortgagor, and to be put in the books of the clerk, it is very probable that the affidavits of these facts would have been made a part of the statute conveyance. It would certainly contribute to the symmetry and completeness of the system, and to the security of the foreclosure titles, that all the perquisites to a valid foreclosure should be shown by affidavits and made a part of the statutory title. But we can see no justification for construing section 14, as it stands, as if the affidavits of service, and affixing notice in the books of the clerk, were mentioned in it. The argument that such a construction would be a protection against frauds and perjuries will not justify it. In Futhil v. Tracy, 31 N. Y. 157, it was held that a sale made pursuant to the statute bars the equity of redemption, without affidavits being made; and if now a deed is given on the sale without affidavits, the facts, according to the opinion in Arnot v. McClure, of publication, posting, etc., may be established by oral evidence. In each of these cases the danger of fraud and perjury is the same as is suggested here.

The production of the affidavits mentioned in section 14, without proof of service on the mortgagor, or of affixing notice in the clerk's office, is not, since the amendments of 1844 and 1857, evidence of a complete foreclosure.

By the 8th section, it is only a sale conducted as "herein prescribed," which bars the equity of redemption, and the party claiming title under the foreclosure would be bound to show all the facts necessary to a valid sale, before he could recover under it; and we think the true construction of the 14th section in this respect is, that the affidavits therein mentioned, when no deed has been executed, are evidence, in the same manner and to the same extent, of a foreclosure, as they would be if a deed had been executed.

We are of opinion, for the reasons stated, that the oral evidence of the residence of the mortgagor at the time the notice was served was competent, and should have been considered by the learned judge on the trial.

There are several other objections to the foreclosure, which will be briefly considered:

1. The amount claimed, in the notice of sale, to be due on the mortgage at the time of the first publication, was $4,845.35. It is insisted that only $3,000 was secured by, or could be collected, on the mortgage, and that the sale was void by reason of the excessive claim made in the notice. Without considering whether the claim of a much larger amount to be due than was due would, in the absence of fraud (and fraud is not claimed), invalidate the proceedings, we are of opinion that it does not appear that the amount claimed was more than was secured by the mortgage. The mortgage was given to secure the commercial paper of the mortgagor, or paper on which his name appeared as maker, drawer, or indorser, then held by the bank, or which should thereafter be discounted or held by the bank, and the condition contains this clause: "But this mortgage is not to be security for over $3,000 at any one time, and is not to extend to any paper received or discounted after three years from the date of

this mortgage." The mortgage was collateral to a bond in the penalty of $6,000. The mortgagor covenants in the mortgage to pay the paper held by the bank when it becomes due, and the interest thereon; and in case of non-payment at the times limited, etc., the mortgage authorizes the bank to sell the mortgaged premises, and, out of the moneys arising on the sale, "to retain all the principal money and interest remaining unpaid on said notes," etc. The mortgage was dated in July, 1856, and the notice of foreclosure was first published in April, 1868. We think the clear meaning and intention was that the mortgage should be security for $3,000 of principal due on the paper held by the bank, and the accrued interest thereon; and upon this construction it does not appear that the amount claimed in the notice exceeded the amount secured and unpaid on the mortgage. See Brainard v. Jones, 18 N. Y. 35.

2. The mortgage was not given to secure unliquidated demands. Butts v. Collins, 13 Wend. 156. The liability of the mortgagor, secured by the mortgage, was a liability then existing, or which should be incurred upon commercial paper. The extent of the liability could be ascertained by inspection of the paper, and a computation after crediting payments made. As the claim was not unliquidated, it is unnecessary to determine whether the statute authorizes a foreclosure by advertisement of a mortgage given to secure an unliquidated demand.

3. The mistakes in the date of the notice filed in the clerk's office, and as first published, were obvious on inspection of the notice, and could not have misled, and did not invalidate the proceedings.

4. It did not appear affirmatively that the affidavit of publication was untrue, or that due publication had not been made.

We think the judgment should be reversed on the point first considered, and a new trial granted.

All concur. Church, C. J., Allen and Rapallo, JJ., concur in opinion, and are also of opinion that the affidavit was sufficient.

NOTE.—The Court of Appeals decided the case upon the ground that, when the mortgagee, on foreclosure, gave a deed under the power in the mortgage, common-law evidence of the various steps necessary to a foreclosure was admissible; that the statute had made *certain* affidavits equivalent to a deed, and that an affidavit of service upon the mortgagor, *not being one of them*, common-law evidence of compliance with this provision of the statute was admissible. As to the particular affidavits, which the statute provides shall supply the place of a deed, it may be remarked:

1. The Revised Statutes of New York provide (2 R. S. 134, § 6; 2 Edm. St. 139): Sec. 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, *or by his lawful agent, thereunto authorized by writing*."

The design of the law-makers was, evidently, to require *written*, documentary evidence of the transfer of title, and that nothing to make a complete, perfect title should depend upon oral and uncertain testimony. The affidavits take the place of a formal conveyance, and must be sufficient to take the transfer out of the operation of the statute of frauds. Jackson v. Colden, 4 Cow. 276, 277; Arnot v. McClure, 4 Denio, 44-46. So careful were they to do this, that they expressly forbade an arbitration of a claim affecting a freehold estate, and such an arbitration is absolutely void. Wiles v. Peck, 26 N. Y. 42.

Prior to the Revised Statutes upon foreclosure, a deed by the mortgagee to the purchaser was *necessary* in order to a proper execution of the *power of sale*, and to vest title, under the foreclosure, in the purchaser. Arnot v. McClure, 4 Denio, 44. A deed by the mortgagee to the purchaser was *a written execution of the power* by the mortgagor's lawful agent, authorized by the mortgage to execute the power. Where a proceeding is statutory, and the statute provides what shall be evidence of a compliance therewith, such proof is *exclusive*, and can *only* be made in the manner provided by the statute.

In Wisconsin (Iverslie v. Spaulding, 32 Wis. 394), upon a tax-sale, the statute required the county treasurer to post notice of sale of the lands of delinquents, and to make and deposit an affidavit of such posting in the office of the clerk of the board of supervisors. This the treasurer omitted to do. The plaintiff called the county treasurer, and offered to prove by him *orally* a compliance with the statute. The court (pp. 396-398) said: "The law required the treasurer to cause the notice of sale, with such statement, to be published in some newspaper, as therein designated (sec. 133, chap. 18, Tay. Stat., p. 427), and also, at least four weeks previous to the day of sale, to post up copies of said statement and notice in four public places in the county, one of which copies should be posted up in some conspicuous place in his office. The affidavit fails to show that this was done, and the tax-deed thereof was invalid within the decision of Jarvis v. Silliman, 21 Wis. 600. But in this case the plaintiff offered to prove by the county treasurer, who made the sale, that he did in fact post four notices prior to the sale—three in the county, and one in the most conspicuous place in his office—as the law directs; and the only material question in the case is, whether the court was right in excluding this evidence, and in holding that it was not competent to prove by parol evidence that the officer complied with the law in regard to the posting of the notices. We are inclined to think that the evidence offered was properly excluded. The law made it the duty of the county treasurer to make an affidavit of the posting of such statement and notice, which, together with the affidavit of the publication, was to be carefully preserved by him, and immediately after the close of the sale deposited in the office of the clerk of the board of supervisors of his county. Secs. 137 and 151, chap. 18, Tay. Stat. These were to be filed and preserved by the clerk in his office, and they were made *prima facie* evidence of the facts therein stated in all judicial proceedings, Sec. 284. Now, the object of these provisions, in thus requiring these affidavits to be filed and preserved in the office of the clerk, doubtless was to enable all persons interested in the matter to ascertain from them whether the law in regard to the posting and publication of notice of sale had been complied with. It was to perpetuate this evidence, and was intended to be for the common benefit of the purchaser and the former owner. These affidavits were to remain on file and take the place of a record, which might be examined by any one to see what the proof was upon these points. And if this was the object of the statute, in requiring these affidavits to be filed and preserved, then it is very clear that parol evidence would be admissible to cure defects in them, or aid them by showing that notices were actually posted according to law. The case seems to fall strictly within the reason and doctrine of the decisions to which we are referred in the brief of counsel, arising under statutes which require the tax proceedings to be recorded, and is governed by analogous principles. These cases hold that the record alone can be resorted to for the purpose of determining whether the requirements of the statute have been complied with, and that the introduction of parol evidence in aid of the record thus required to be made would defeat the policy of the law. Blackwell on Tax Titles, pp. 248, 249, and authorities cited in note 1. The counsel for the plaintiff conceded that, if the defect related to any matter which the statute required should be recorded, then parol evidence would be inadmissible to supply the omission. But we think the same rule should be applied to the affidavits under the circumstances, that would apply to a statement which the law required should be recorded. For these affidavits constituted in fact a part of the record of the tax proceedings, and may have been examined by the original owner, who failed to redeem solely for the reason that he discovered there was no record evidence that any proper notice of sale had been given by the county treasurer."

The affidavits may perform two functions: 1. They may be used as proof of a compliance with the statute *in connection with a deed or conveyance under the power*. 2. In case there be no deed or conveyance under the power, then, by the express terms of the statute, they operate *per se* as a deed or conveyance. In the latter case it is only *such affidavits, as the statute declares shall operate as a deed, which so operate*. Arnot v. McClure, 4 Denio, 44-46.

Arnot v. McClure (4 Denio, 41), was a case where title

was claimed under the mortgagee. The court say, at page 46: "Where there is no deed, and affidavits supply its place, they can neither be contradicted nor amended by oral evidence. If they do not show a sale of the mortgaged premises, the foreclosure is not complete. Without either a common-law or a statute conveyance, the title can not pass." In Cohoes Co. v. Goss, 13 Barb. 144, Cady, J., giving the opinion of the court, held: The affidavits are a substitute for the deed, and until made and recorded, no title passes. The statute gives no effect to a foreclosure by advertisement, unless conducted as prescribed in the statute. Layman v. Whiting, 20 Barb. 559, holds the same doctrine fully, and also holds that, where an affidavit of service of notice on the mortgagor is made after commencement of action, the plaintiff will fail to show title in himself at the time the suit was commenced, and must therefore be nonsuited. Also, that making and recording of an affidavit of service on mortgagor, after the commencement of the action, will not vest a title in the purchaser *by relation*, as of a time previous, so as to enable him to recover. Also that parol evidence of service of notice of sale upon mortgagor is admissible, *but it will not dispense with the production of the affidavit specified in the statute.* Bryan v. Butts, 27 Barb, 503, held the same doctrine fully. And also that a mortgagor is not divested of his title until all the proceedings to foreclose the mortgage have been completed, and not until all the steps required by statute have been taken; and there is no transfer of title until all the necessary affidavits have been made and *recorded*, and that it is the recorded affidavits that operate as the statutory transfer of title. This case presented the precise point involved in the case at bar, and fully covers this case in this respect.

Dwight v. Phillips, 48 Barb. 116, holds the same doctrines, and holds that "the statutory proceedings to foreclose a mortgage are not *proceedings in court*, so as to authorize the courts to remedy defects in them, and holds, with Judge Hand, that new affidavits might be recorded which would lay the foundation of a new action. Tuthill v. Tracy, 31 N. Y. 157, settles this question. Bunce v. Reed, 16 Barb. 347, was a special-term case, decided by Justice Hand, and while he held that new affidavits might be recorded, he expressed no opinion on the question whether they could be used in a suit pending when made, or whether they could have any retroactive effect. This case decides nothing. Howard v. Hatch, 29 Barb. 297, only decides that the affidavits of sale need not be recorded. That the affidavits when *made* are evidence of title. This case requires that the proof shall be by affidavit. There was no question in the case, whether defects in the affidavits could be supplied by parol evidence, or whether new affidavits, made after action was commenced, could be used on trial. This is the only case found which holds that affidavits need not be recorded. Justice Balcom wrote the opinion.

Mowry v. Sanborn, 62 Barb. 223, was the case at bar on the first appeal. Justice Balcom wrote the opinion. All that he says on this subject is *obiter*. No such question was discussed on the argument, and no such question was either directly or indirectly involved in the case. As an authority for his *obiter* remarks, Judge Balcom cites the case of Davis v. Davis (MSS.), decided in the sixth district, some "18 years" before. The case of "Davis v. Davis (MSS.)" and the case of Howard v. Hatch are both overruled by the decision of the court of appeals in Tuthill v. Tracy, 31 N. Y. 157. Chalmers v. Wright, 5 Robt. 713, was a special-term case, and the remarks of Robertson, C. J., are *obiter*. There was no evidence offered except the affidavits of sale. Arthur v. George, 4 N. Y. S. C. R. 635, was a case where service of notice was made on "C. S., administrator, etc.," and on the trial plaintiff proved the mortgagor was dead, and letters of administration to C. S. The party simply proved that "C. S., administrator, etc.," was the personal representative of mortgagor, and the general term held the affidavits were sufficient, and this proof was immaterial. There was no attempt to supply a *defect* in the affidavits.

Ejectment can be maintained only on the title existing at the commencement of the action. Sacramento Savings Bank v. Hines, 50 Cal. 195; Wattson v. Thibou, 17 Abb. 184; Garrigue v. Loescher, 3 Bosw. 578; McCullough v. Colby, 4 Bosw. 603; Shinners v. Brill, 38 Wis. 648; McKay v. McKay, 25 U. C. Q. B. 133.

Where proof of a fact is required to be made in writing, parol evidence, though admitted without objection, is insufficient to establish the proposition. "A parol agreement should not be received in evidence on the trial to vary the terms of a written assignment, and if it be, it is not error in the judge to disregard such illegal evidence, without any subsequent order to expunge it, in his final ruling." Durgin v. Ireland, 14 N. Y. 322, 326-327; Bonesteel v. Flack, 41 Barb. 439, 440.

2. A statutory foreclosure must be in strict accordance with the statutory enactments. Such enactments must be *strictly* complied with, or no title passes. Layman v. Whiting, 20 Barb. 559; Campbell v. Swan, 48 Barb. 108;—so strictly that, where the statute authorizes the mortgagee to purchase the property at the sale thereof by auction, if the auctioneer act as his agent, and bid off the property in the name of the mortgagee, the sale is void because the position of auctioneer, and accepting his own bid as buyer, are inconsistent and incompatible, and such a sale is absolutely void. Campbell v. Swan, 48 Barb. 113, 114.

The sale must be in compliance with the statute, and if not, it is irregular. If irregular, it is *void*. Jackson v. Clark, 7 Johns. 218, 225, 226. If, under the circumstances of the case, the mortgagee can not comply with every requirement of the statute authorizing a foreclosure by advertisement, he can not so foreclose, and any attempted foreclosure will be void. He must resort to equity. Dutton v. Colton, 10 Ia. 408

3. A sale is *void*, if it is intentionally made or conducted in a manner to deceive or mislead either the mortgagor or his creditors. "Where the advertisement of sale of mortgaged premises, under a power, states a *false* assertion, as that the premises are to be sold for default of *three* mortgages, when there were only *two*—the third being on other land—by which the *public* might be misled, or purchasers deterred from bidding, the sale will be irregular and *void*." Burnett v. Dennison, 5 Johns. Ch. 35, 42; Jackson v. Clark, 7 Johns. 225, 226; Joyner v. Third, etc., 3 Cush. 567; Wells v. Burbank, 17 N. H. 412. It is undoubtedly true that a mere mistake in computing the amount due, trifling in its character and not calculated to inflict serious injury upon the mortgagor, or any mistake not calculated to mislead—as giving correctly the place and date of recording, but mistakenly specifying the wrong book or page—would not render a statutory sale invalid, provided it be made within the power conferred by the mortgage; or, in other words, do not exceed the amount secured. The statute provides (2 R. S. 545, § 2, subd. 3; 2 Edm. St. 565), that "To *entitle* any party to give a notice, as hereinafter prescribed, and to make such foreclosure, it shall be requisite that such *power* of sale has been duly registered, or the mortgage containing *the same* has been duly recorded."

So long as the mortgagee does not foreclose for more than the amount secured by the mortgage, he does not *exceed* the "*power*," although he may err as to the amount. Jencks v. Alexander, 11 Paige, 619; Klock v. Cronhite, 1 Hill, 107; Bunce v. Reed, 16 Barb. 347; Butterfield v. Farnum, 19 Minn. 85; Menard v. Crowe, 20 Minn. 449. See Mowry v. Sanborn, 62 Barb. 223. But the moment he attempts to foreclose for more than the mortgage secures, it is not then a question of mistake, but a clear *want of power* to do what he is doing, to wit: foreclosure for *such* amount. The *particular* foreclosure is not *within* the power conferred, and is void. McQuestin v. Swope, 12 Kas. 32. In Spencer v. Anon, 4 Minn. 543, the court said: "The record in this case discloses the following facts: The plaintiff held a note against the defendant for $920, dated July 22, 1857, payable six months from date. The amount named included the interest to maturity. The note was secured by a mortgage, containing an ordinary power of sale, on the real estate in controversy. On the fourth day of October, 1858, no part of the note having been paid, the plaintiff proceeded to foreclose the mortgage by advertisement under the statute. At the date of the first publication of the notice of sale, the note, with the interest added, amounted to $964.62 only; yet the notice stated the amount claimed to be due at $1,606.60, or about sixty-five per cent. more than the note called for. The notice was published at the requisite time, and at the time specified therein the property was sold for the sum of $1,386, the plaintiff himself becoming the purchaser, but without paying to the officer making the sale, or to the mortgagor, the overplus, after discharging the note and costs of sale. A sale made under such circumstances ought not to be sustained. When the holder of a mortgage, instead of proceeding to foreclosure by judicial proceedings, wherein all interested are necessary parties, and in which all questions may be regularly determined by a competent tribunal, resorts to the power contained in the mortgage, thus taking the remedy into his own hands, by an *ex parte* proceeding, it is but

reasonable that he should be kept strictly within the terms of the power, and held to a rigid observance of all the requirements of the statutes which regulate its exercise. The published notice that the property will be sold is all the notice that parties interested have of this proceeding, and this notice, the statute declares, must contain certain specifications, any one of which it would be fatal to omit. One of these specifications is, that the notice shall state the amount claimed to be due upon the mortgage at the date of the notice. We do not hold that it is absolutely necessary to state with certainty the exact amount legally due; for a party under a mistake of law or fact may honestly claim more than by law he would be entitled to; and if the other party is not shown to be prejudiced thereby, the sale should not be disturbed. The mortgagee may be ignorant of, or contest, certain alleged payments. He may estimate the amount according to the strict terms of the contract, or may err simply in a computation of the interest; and if, under such circumstances, he claims more than he could legally recover, it does not necessarily vitiate the sale. Perhaps any amount within the terms of the contract may, in good faith, be claimed without affecting the legality of the notice. But we do hold that a party can not arbitrarily or wantonly claim in his notice a sum which neither the terms of the contract nor any legitimate calculation based thereon will justify. An excess of trifling amount, arising from a mere error of computation, would not be deemed material; but we can not regard the present case as one of that kind; for here the sum claimed exceeds, by more than one-half, the amount which any calculation based upon the note would produce; and whether this was done arbitrarily and wantonly, or through ignorance merely, it can not be excused. We think the notice given by the plaintiff was not in accordance with the statute, and that it tended to prejudice the mortgagor, and to discourage competition at the sale. In stringent times, such as the people of this state have experienced for the last three years, real property, at a forced sale, seldom brings anything near its actual value. When the creditor enters the list as a bidder at a sale, he has an advantage over all others, inasmuch as he may bid to the extent of his claim without paying out any money except for costs, while others bid knowing that they must respond in money to the full extent of their bids, unless they can arrange as to the excess, after the claim is satisfied with the party entitled thereto. The greater the amount therefore, due the mortgagee, the greater the amount required of others to enable them to compete with him, and consequently the narrower the circle of bidders. If property worth a thousand dollars is offered at public sale to satisfy a mortgage of a hundred dollars only, I may arrange with the mortgagor, to whom the surplus is coming, so that I can bid, knowing that I have really but one hundred dollars, the amount of the claim, to pay at the time; and as soon as enough is bid to satisfy the mortgage, I am on equal terms with the mortgagee. But, if his mortgage is five hundred dollars, I may be deterred from attempting to procure so large an amount, and no one, unable to pay at once a sum equal to that claimed to be due, will attempt to bid at the sale. To the extent, therefore, of the amount due on the mortgage, the mortgagee, it seems to me, has an advantage over all competitors, and if he may arbitrarily claim any sum he pleases, to be due, the advantage is still more apparent, especially if the sale made to him should be held valid without his paying over the excess."

This case was approved in Ramsey v. Merriam, 6 Minn. 168, where the court held a trifling excess would not vitiate the sale, but that the amount claimed must be "*within the terms of the security.*" So, that the mortgage will be foreclosed "for the purpose of foreclosing the right in equity of the mortgagee," instead of the mortgagor, is fatal. It is liable to mislead, and the statute must *be strictly* complied with. In Abbott v. Banfield, 43 N. H. 152, 155-6, the court said: "It is suggested in argument that the error in the publication should not be regarded as material; but the general doctrine, both in legal and equitable proceedings, seems to be, where a statute directs the publication of notices having reference to personal rights or property, the requirements of the statute are to be strictly pursued. Nothing that can be reasonably made certain and definite is to be disregarded. So in relation to legal process, tax titles, laying out highways, etc. 6 Cushing, 256; 28 Miss. 354; Gray v. May, 16 Ohio, 66. The party may not have been misled by the notice as published; it is sufficient that it did not conform to what the statute did require, and that its tendency was to mislead the reader or him who was directly interested to redeem the mortgage. The publication can not be, therefore, adjudged a sufficient compliance with the law in this case." See, also, People v. Becker, 20 N. Y. 354.

Both the mortgagee and the purchaser have the *power* before them, and are bound to know its *extent*, or when they lose jurisdiction. Although a party may not be subjected to loss on account of a mistake, yet where he does an unauthorized act, knowing what he does, but mistaking the law or legal effect thereof, he must abide the legal consequences of the act. Bank of Utica v. Wager, 2 Cow. 712, 769.

It would be a poor answer to say to the mortgagor that if too much is claimed, he may, by a suit in equity and an injunction, restrain the sale. The fact that equity will *prevent* injustice and stay the rapacity of the creditor gives him no *statutory right to perpetrate* and carry out such injustice. If more than the mortgage provides for be claimed, and the mortgage foreclosed therefor, the foreclosure is without jurisdiction, and must necessarily be void. A judgment for $4,800 by a court, with a jurisdiction limited to $3,000, would concededly be void. Why should not similar unofficial and irresponsible action by the party in interest be equally void? The sale is *under* and to *carry out* the power given by the mortgage. The power of sale is expressly required by the statute to be in writing, and to have been "duly recorded" before the sale is attempted. 2 R. S. 545, § 2, subd. 3; 2 Edm. St. 565. If it be not, the sale is void. Wells v. Wells, 47 Barb. 416.

4. A *material* mistake in the notice or other proceedings would render a statutory foreclosure void. It is a question of power, and if the omission to affix the true notice was a mistake, it will not aid plaintiff. In the language of Judge Bronson, in Sharp v. Speir, 4 Hill, 88: "Honest error can not confer power." "The intention of the mortgagee, however clearly expressed, without showing that he has performed the acts necessary to that purpose, will be ineffectual to establish a foreclosure." Morris v. Day, 37 Maine, 386, 388; Freeman v. Attwood, 53 Maine, 473, 474-5.

There being no sufficient affidavit of service of notice of sale on the mortgagors, and no affixing in the book kept by the clerk, etc., of a copy of the notice of sale, the sale was not conducted as prescribed by the statute. The affixing the notice in the book kept by the county clerk is one of the modes provided by law for giving notice of sale. The remarks of Justice Gridley in Van Slyke v. Sheldon, 9 Barb. 284, 285 and 286, on the effect of an omission to serve a notice on the mortgagor, are directly applicable to the omission to affix notice. In that case (page 286), the court say: "Again, the 8th section of the Revised Statutes, which declares the effect of a sale upon advertisement, is amended by the act of 1844 (1857), so as to make the sale a bar only on condition that a notice has been served on the parties (affixed in the book, etc.), pursuant to the new requirements of that act."

The publication, posting, serving and affixing notices, are all conditions precedent to a sale on foreclosure. If one can be omitted, all can be. The statute is *mandatory*, not *directory*. Hall v. Hill, 22 U. C. Q. B. 578 affirmed; 2 Errors and Appeals, 569; Hazlett v. Hall, 24 U. C. Q. B. 484. In Ely v. Carnley, 19 N. Y. 496, the court of appeals held, that "a clerical error in the copy of a chattel mortgage, and the accompanying statement of the amount claimed, by which such amount is overstated $100, is fatal, and its validity against creditors ceases with the year after filing an accurate copy." In that case it was a mere mistake of the copyist, and no fraud was intended or charged; yet the court refused to disregard the variance.

BOOK NOTICES.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF UTAH, from the organization of the Territory up to, and including the June Term, 1876. ALBERT HAGAN, Reporter. Volume 1. San Francisco: A. L. Bancroft & Co. 1877.

This is a small volume of less than four hundred pages, containing about seventy-five decisions of the Supreme Court of Utah, from 1850 to 1876. The judges of this court are at present, Hon. Michael Schaeffer, Chief Justice, and Hons. P. H. Emerson and J. S. Boreman, Associate Justices. The opinions here reported are

for the most part of little importance to the profession outside of the territory. At page 344, we find the decision of this court, in the case of Wiggins v. The People, on the question of the admission of evidence of uncommunicated threats in a trial for homicide. The judgment of the court here was reversed in the Supreme Court of the United States, reported 4 Cent. L. J. 345.

CORRESPONDENCE.

PROCTOR V. HANNIBAL AND ST. JO. R. R.

To the Editor of the Central Law Journal:

There is no fairer field for criticism than the judicial construction of statutes. When the wisest judges under the sun undertake soberly to tell what a body of legislators mean by the language of a legislative act, and in reaching a conclusion, there is the slightest variation or departure from the known and accepted meaning of English words, "the door is open, and any one may walk in." Especially is that so when the doctors disagree with each other, and more especially when some of them disagree with themselves.

The decision of the above entitled case in 4 Cent. L. J. 299, overruling the case of Schultz v. Pacific R. R., will be hailed with delight by all the railroad lawyers in the State of Missouri, and with disgust by all the damage lawyers. Many of the latter who have undertaken to prosecute suits, upon the faith of the overruled case, and have made a contract to accept a fee, contingent upon success, may regard the change as one "calculated to impair the obligation of contracts."

In delivering the opinion of the court in this case, his honor prefaced that portion which has direct reference to the statute to be construed, by a statement of the common law rule upon the subject. This rule of exemption of the master from liability to a servant for the consequences of the negligent acts of fellow-servants, has become so well established by repeated decisions that no one would now presume to question its existence, whatever they might think of its justice in the abstract. The following is a portion of the opinion of Chief Justice Shaw, delivered in Farwell v. B. & W.R. R.Co., 4 Metc. 491, quoted in the opinion delivered in the Proctor case, as an argument in support of the rule: "Where several persons are employed in the conduct of one commission, enterprise, or undertaking, and the safety of each depends much on the skill with which each shall perform his appropriate duty, each, as the observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common carrier will not take such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than can be done by a resort to the common employers for indemnity, in case of loss by the negligence of the others." I am frank to say that in my humble opinion, a rule founded solely upon upon such flimsy logic as the above would not be entitled to a great deal of respect. Say nothing about the rule, and endeavor to apply the *reasons* given to some of the commonest instances of hazardous employment, outside of railroading. Take, as an example, the relations and duties subsisting between the different members of the crew of a steamboat. The captain, the clerk, the pilot, the engineer, the strikers, the mates, the cook, the steward, the cabin boys, the chambermaid, the deck-hands, the roustabouts, are all "employed in the conduct of one commission, enterprise, or undertaking, and the safety of each depends much upon the skill with which each shall perform his appropriate duty." Now, imagine one of the roustabouts, the cabin boys, the deck-hands, or the chambermaid, observing the negligence or incapacity of the captain, the pilot, or the engineer, and giving notice to the owners of any misconduct. To decide a case upon the theory that one of these subordinate river navigators had the most rudimentary knowledge of the duties of his superiors, would be to give judicial imagination the wings of the wild goose. Neither Chief Justice Shaw nor any of the supreme judges of Missouri would ever give this reasoning such an application. But Chief Justice Shaw, in another portion of the opinion in Farwell's case, says, by way of a hint, as to what is "one commission, enterprise, or undertaking," that "when the object to be accomplished is one and the same, *when the employers are the same, and the several persons derive their authority and their compensation from the same source*, it would be extremely difficult to determine what constitutes one department, and what a distinct department of duty." The whole question of fellow-service, or common employment, is made to rest upon the fact that the same master employs and pays the servants in conducting the same general business or enterprise—this makes them fellow-servants. Now, the alleged reason of this rule can be carried a little further into the ethereal realms of absurdity. Suppose the common master to be the owner of a line of steamers, navigating the same stream. The roustabout, the deck-hand, the porter, the cabin boy, or the chambermaid, are all supposed to be intelligent observers, not only of the captain, the pilot, the engineer, the strikers, the mates and the firemen, on the boat upon which he or she is engaged, but they are all supposed to be equally well informed in regard to the same officers on all boats of the line. Through the carelessness, negligence, or incompetency of one or another of the important officers of any one of the master's steamers, either one or all of these subordinates may be injured or killed. In case of collision between two vessels of the same line, where the officers and servants upon each were engaged in the service of a common master, it would be a waste of time for the sufferers of the crew or their representatives to inquire as to where the fault lay, with a view to ascertaining the right of recovery, unless the victim is prepared to prove negligence in the employment of incompetent servants. Understand, I am not combating the application of this universally acknowledged *rule* to a proper case. It is the *reason* assigned for the rule that I am after. No position is strengthened, it is rather weakened, by weak argument. And the weakness of the argument is so clearly recognized by Chief Justice Shaw, that in another part of the same opinion he abandons it in the following language: "The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* does not extend to indemnifying the servant against the negligence of any one but himself."

In the case of Farwell v. B. & W. R. R. Co., the plaintiff was an engineer in the employ of defendant, and the negligent act alleged was committed by a switch-tender, known to be sober and competent, and for a long time previously in the employ of the same company. There was but this single act of neglect or carelessness alleged against him. The case was one of first impression in Massachusetts, and the learned judge in conclusion, after calling attention to the novelty of the question, uses the following cautionary language: "We would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle."

In the Proctor case the servant who was injured was

the engineer in charge of one locomotive going in one direction, while the act of negligence was that of the servants of defendant in charge of an entirely independent locomotive and train going in an opposite direction. Their duties were separate and distinct; nor were they in any stricter sense employed in the conduct of one commission, enterprise, or undertaking, than would be two pilots or engineers of separate vessels, belonging to the same owner, and navigating the same stream. If for the commission, enterprise, or undertaking, we are to look to the ultimate end the employer has in view when he employs them, the common service would include every one whose services were conducive to the accumulation of wealth by the master in the business in which they are engaged. An agent employed to negotiate the bonds of the company, or attend the legislature as a lobbyist in its interest, would be as much the fellow of the engineer, as the fireman who assisted in manipulating his engine. But if the reason assigned for the rule quoted above is to have any influence in shaping the decision of the court, it would seem proper to confine its application to instances where the fellow-servants or co-employees, in the case of a steamboat, were engaged in the navigation of the same vessel, upon the same voyage; and, by a parity of reasoning, in the case of a railroad, the running, conducting, or managing of the same train. Each trip should be viewed in the light of an independent voyage, where the different members of the crew are involved in a common danger, and mutually dependent upon each other's skill.

Suppose, as is frequently the case, two or more railroad companies were running their locomotives and cars over the same track, and, through the negligence of the servants of one of the companies, one of its trains should collide with a train belonging to the other company, and injury should result to the servants of the company who were not in the wrong. The opportunities of the sufferers to observe and judge of the competency of negligent servants would be as good as though they were employed by a common master, and if they judged it prudent, they would have the same opportunities to quit the employment of their own master, to avoid the risks incident to the negligence or incompetency of the servants of the joint occupier of the road. But for all this, the company employing the negligent servants, whose fault occasioned the injury, would not be exempt from liability. It would seem to be a better and more sensible way to dispose of this rule, to go back to first principles, and say that when a common carrier, or any one else, does the best he can in the employment of necessary servants and agents to conduct a business, and is not guilty of personal negligence, that he is not to blame for the occasional negligent acts of his servants *to any person;* that, in order to insure a proper degree of care on the part of both master and servants, the master is held liable *to strangers* for the conduct of his servants, in the course of their employment; but that the interests of society in general, and a proper regard for the interests of the masters, whose capital is embarked in dangerous enterprises, did not demand an extension of the artificial rule, for the benefit of the servants so employed, who were supposed to enter the service for wages proportioned to the risk. It would be better to give even no reason at all, than a poor one.

In construing the second section of the damage act, the learned judge frankly admits at the outset, that, literally interpreted, the words, "any person," would include servants and employees of the company, as well as passengers. From beginning to end, this section is one long-winded sentence, so repetitious that the mind of the reader is confused at about every fifth line. There are several things, however, obvious: 1. A railroad employer is a person, and so is a passenger. 2. The section has several clauses, the first of which applies to persons, and the second is restricted to passengers. 3. The first clause speaks only of acts of "negligence, unskillfulness or criminal intent, of officers, agents, servants or employees, while running, conducting or managing any locomotive," etc.; while the second clause has reference solely to defective tracks, machinery or vehicles. 4. The first clause fixes the liability upon *employers*, while the second fixes it upon *owners*. 5. In conclusion, the section gives the right of action, under either clause, to certain designated representatives of "every person or passenger." 6. The damages are liquidated.

One of the most prominent grounds for rejecting the apparent meaning of the words of the statute, is that it would involve an inconsistency with the common law, or with some other statutory provision. If such a course of construction be adopted, we might as well abandon legislation altogether. Another reason assigned, is that it is evident that it was not in the legislative mind to alter the common-law relations of master and servant, but simply to transmit to representatives the right of action in case of death, which the injured person would have have had, had he survived. If anything is evident from the language of the statute, it is that the legislature had several objects in view, else why all these distinctions? If they simply desired to transmit to representatives a right of action which would have existed in the decedent, had he survived the injury, why did they not say so, and drop the matter? The third section of the act would have accomplished that result. They intended something more, or they would not have designated with particularity the different kind of injuries for which different parties were to be held liable; they would not have made the useless distinction between passengers and persons; they would not have drawn a line between injuries from the negligence or criminal intent of agents, etc., and from defective track, machinery, etc.; they would not have designated the order in which the representatives would be entitled to sue; they would not have liquidated the damages. If it did not create a new right of action, then, in case the person was instantly killed, his representatives could not maintain an action against the company, for at common law the dead man could not have sued. In the minority opinion in Connor v. C., R. I. & P. R. R. Co., 59 Mo. 285, which is cited with approval in this case, one of the rules of construction invoked is that it must be presumed that the legislators understood the common law rule as to the subject upon which they were legislating. There could be no question of the propriety of an appeal to the common law, for the purpose of construing language ambiguous or doubtful in its import; but it is hardly fair to make use of so violent a presumption in order to change the obvious meaning of terms employed in the written law, and to make the meaning of the legislation harmonize with the law as it should be.

Another objection offered to the plain construction of the statute, is that it discriminates in favor of the representatives of the injured servant who dies, and against the servant himself,—because it gives a right of action to the former for the killing which the latter would not have at common law for the same injuries, if he lived. This, it is said, would be wrong and unjust, and, as the law-makers were presumed to know that such would be the effect of their action, they could not be supposed to intend any such unjust result. Admitting under protest the legislators' presumed knowledge of the common law, we see nothing so absurd or unreasonable in supposing that they might seek to provide a remedy for certain dependent

relatives of a person, and omit to provide a similar remedy for him while he lived. It seems quite evident from this case, and the first minority opinion in the Connor case, that the judicial mind is shocked at the idea of a man's life being of greater value to his wife or child than his limbs are to himself. The writer of this has been where the living fragments of what had been vigorous and stalwart men were nursed with the tenderest care, and watched with the most anxious solicitude by wives, children and parents, and has noted the tenacity with which these maimed ones clung to the spark of life. The loss of legs and arms was almost disregarded, in view of the fact that life was spared. Might not the legislature be such a body of old fogies as to look upon the life of a husband, son, or father, as something so valuable as to be the object of special compensation, while they overlooked, or failed to provide for, the loss of legs and arms? Might they not have legislated, to some extent, oblivious of the fact that persons injured by railroad and other casualties, "may suffer, for an indefinite period of time, the tortures of the damned?"

As to the objection that the plain construction might subject the defendant to "*two actions by different parties for the same money*," I would simply acknowledge being unable to see how the construction put upon the words "any person" would make any difference in the number of actions to be brought "for the same money." Suppose the "person" is a passenger. If he is injured, and survives for a year, and then dies from his injuries, would his case be any the less complicated than that of an engineer or fireman under similar circumstances? It cannot be denied that the words "any person" would include *passengers*, and that a passenger may maintain an action against the corporation for injuries resulting from the negligence of its employees. Suppose the passenger brings his action and recovers, and then dies after the expiration of one year, could his representatives maintain an action for his death, and, if so, would this not be "holding the party liable in two actions to *two different parties* for the *same money*," to the same extent as it would had the action been brought by an employee, and subsequently by *his* representatives?

ST. LOUIS, April 2, 1877. W. P. W.

RECENT LEGISLATION.

MISSOURI LEGISLATURE—SESSION OF 1877.

AN ACT to amend chapter 201 of the general statutes of Missouri, entitled "Of offenses against public and private property," by adding a new section thereto, to be known as section 69, the same being article 3 of chapter 42 of Wagner's Missouri statutes.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Chapter 201 of the general statutes, the same being article 3 of chapter 42 of Wagner's Missouri statutes, is hereby amended by the addition of a new section thereto, to be known as section 69: Sec. 69. Every person who shall agree or promise, or who shall advertise through the public press, or by letter, to furnish employment or situations to any person or persons, and in pursuance of such advertisement, agreement, or promise, shall receive any money, personal property, or other valuable thing whatsoever, and who shall fail to procure for such person or persons acceptable situations or employment within the time stated, or, if no time be specified, then within a reasonable time thereafter, and who shall fail or refuse to return the money, personal property, or other valuable thing so obtained, when the same shall have been demanded by such person or persons, shall be guilty of a misdemeanor, and, on conviction thereof, be punished by a fine not less than forty dollars, nor more than five hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Approved March 20th, 1877.

AN ACT to amend an act entitled "An act to regulate the inspection of petroleum oils or fluids, or any product thereof sold or manufactured for illuminating purposes," approved March 24, 1870.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That section 2 of an act entitled "An act to regulate the inspection of petroleum oils or fluids, or any product thereof sold or manufactured for illuminating purposes," approved March 24, 1870, be amended by striking out the words "one hundred and ten," in said section, and inserting in lieu thereof "one hundred and fifty," so that said section, when so amended, shall read as follows: Sec. 2. It shall be the duty of the inspector, when called upon for that purpose by the owner, manufacturer, or dealer of any of said illuminating oils or fluids, promptly to inspect or test and gauge the same within the city or town for which he is appointed. The inspector shall in all cases take the oil or fluid for test from the package which is intended to be branded, and in no case shall he mark or brand any package before having first inspected or tested the contents thereof; and the quantity used for testing the fire test of such illuminating oil or fluid shall not be less than half a pint, and shall be ascertained by applying thereto a well-lighted match; and all such illuminating oils or fluids that will ignite or burn at a less temperature than 150 degrees Fahrenheit he shall brand "rejected," and all that will stand the fire test of 150 degrees Fahrenheit he shall brand "approved standard fluid."

SEC. 2. All acts or parts of acts inconsistent with this act are hereby repealed.

Approved March 20th, 1877.

AN ACT to amend an act entitled an "Act to amend section 56 of an act entitled "An act dividing the state into judicial circuits, prescribing the times of holding courts therein, and providing for the election of five additional circuit court judges and circuit attorneys," approved March 15, 1872, being section 60 of article 3, chapter 41 of Wagner's Missouri Statutes, entitled 'Of circuit courts'; and for the continuing in force executions, orders of sale, and all writs and process of the Circuit Court of Stoddard County, and making them returnable in conformity with this act," approved February 10th, 1875.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Section 1 of the above recited act is hereby amended to read as follows: Sec. 1. That section 56 of an act entitled "An Act dividing the state into judicial circuits, prescribing the times of holding courts therein, and providing for the election of five additional Circuit Court judges and circuit attorneys," approved March 15, 1872, is hereby amended so as to read as follows: Sec. 56. In the twenty-third judicial circuit, in the County of Stoddard, on the first Mondays in March and September; in the County of Wayne, on the first Mondays in April and October; in the County of Carter, on the third Mondays in April and October; in the County of Ripley, on the fourth Mondays in April and October; in the County of Butler, on the first Mondays in May and November; and in the County of Dunklin, on the third Mondays in May and November.

SEC. 2. Section 2 of said act is hereby amended to

read as follows: Sec. 2. That all executions, orders of sale, writs and process, which, before the passage of this act, were issued out of the Circuit Court of Stoddard County, and which, had not this amendatory act been passed, would have been returnable to the August term, 1877, of the Circuit Court of Stoddard County, are hereby continued in full force, and made returnable to the September term, 1877, of said court in conformity with this act.

SEC. 3. All acts and parts of acts inconsistent with or repugnant to this act are hereby repealed.

Approved March 20, 1877.

AN ACT to encourage the destruction of rats.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. It shall be lawful for any county court in this state to offer a reward not exceeding five cents per scalp for the destruction of rats, the same to be paid out of the county treasury of the county in which the rats are killed; *Provided*, That no reward shall be paid for any number of rats less than fifty.

SEC. 2. Any person claiming such reward shall produce the scalp to the clerk of the county court of the county in which such rats are killed, within one week thereafter; whereupon the clerk shall administer to such persons the following oath: You do solemnly swear (or affirm as the case may be) that the scalps produced by you are of rats killed or taken by you, or some person employed by you, within this county, and within the past week.

SEC. 3. The clerk shall forthwith destroy such scalps and give to the person proving up the same, under the hand of such clerk, a certificate setting forth in plain and legible handwriting without interlineation, the number of scalps, the name and residence of such person; which certificate shall be in the following form:

State of Missouri, } ss.
County of —— }

This is to certify that —— ——, in the County of ——, did this day prove before me —— rat scalps, and is entitled to the sum of $——

Given under my hand this —— day of ——, 18—.

SEC. 4. Such clerk shall keep a register of all such scalps in a book which shall be kept for that purpose, in which he shall note down every certificate granted, the number of scalps proven, and shall transmit a copy of such register, under the seal of the court, to the treasurer of the county, who shall not allow and pay any certificates which shall not correspond with such register.

SEC. 5. Such clerk shall issue a certificate to any person proving not less than fifty in number; and for administering said oath and issuing certificate, he shall be entitled to a fee of 25 cents, to be paid by the party to whom the certificate is issued.

Approved March 20, 1877.

AN ACT authorizing the appointment of a Marshal or Janitor of St. Louis Court of Appeals, and providing for their compensation.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The St. Louis Court of Appeals shall appoint a marshal and a janitor, whose respective duties and terms of office shall be governed by the laws applicable to the marshal and janitor of the supreme court of this state.

SEC. 2. The marshal of the St. Louis Court of Appeals shall receive compensation for his services in a sum not to exceed the sum of $2,000 per annum, to be paid quarterly, such compensation to be fixed for his services by the St. Louis Court of Appeals by order of said court entered of record.

SEC. 3. The janitor of said court shall receive compensation for his services in a sum not to exceed the sum of $900 per annum, to be fixed by said court by order entered of record, and to be payable monthly, except as hereinafter directed.

SEC. 4. The said marshal and janitor shall receive out of the state treasury one-third of their respective salaries, as may be fixed by order of said court, in four equal instalments; and said marshal and janitor shall present their accounts to the state auditor, approved by the presiding judge of said court, and the auditor shall draw his warrant therefor upon the treasury, to be paid out of the appropriations made for the payment of the civic officers of the state.

SEC. 5. The business of the St. Louis Court of Appeals being now carried on at a daily inconvenience to said court and the suitors therein, for want of the legislation hereby intended, an emergency is hereby declared to exist requiring the immediate enforcement of those provisions; wherefore this act is to take effect from and after its passage.

Approved March 20th, 1877.

AN ACT to authorize County Surveyors or their Deputies to enter mining shafts for the purpose of making surveys of drifts and establishing the lines of the same.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. When any owner, tenant or sub-tenant of a lot or lots or tract of land, shall file with any justice of the peace, within the county in which said lot or lots or tract of land may be situated, his or her affidavit or the affidavit of any other creditable person for them, stating that from knowledge, information or belief the party or parties owning, controlling, or working the adjoining lot or lots or tract of land, and upon which said party or parties are sinking shafts, mining, excavating and running drifts, and that said drifts in which said parties are digging, mining, and excavating mineral ore or veins of coal, extend beyond the lines and boundaries of said lot or lots or tract of land, owned, controlled, or worked by them, and have entered in and upon the premises of the party or parties making said affidavit, or for whom said affidavit is made, the justice of the peace, after first being tendered his lawful fees, shall issue his written order and deliver or cause the same to be delivered to the county surveyor or his deputy, commanding him, after his reasonable fees have been tendered, to proceed without delay to survey said drift by entering any and all shafts upon said lot or lots or tract of land that he (the surveyor) may see fit, for the purpose of ascertaining the course and distance of said drift or drifts, and to locate the same upon the surface.

SEC. 2. The surveyor shall, before entering upon said duty, read said order to the party or parties owning, controlling, or working any shaft or shafts on said lot or lots or tract of land.

SEC. 3. If said party or parties owning, controlling or working said shaft or shafts on said lot or lots or tract of land, shall refuse, hinder, or prevent said county surveyor or his deputy and his assistant from entering said shaft or shafts or drifts to make the survey so ordered by the justice of the peace, and every person so offending, shall on conviction be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail for a term of not exceeding one year, or by fine not exceeding $300, or by both said fine and imprisonment.

SEC. 4. This act to take effect and be in force ninety days after the adjournment of the present session of the General Assembly.

Approved March 20th, 1877.

THIRTIETH GENERAL ASSEMBLY OF ILLINOIS.

AN ACT to punish the offense of advertising for divorces.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That whoever advertises, prints, publishes, distributes, or circulates or causes to be advertised, printed, published, distributed or circulated in any circular, pamphlet, card, hand-bill, advertisement, printed paper, book, newspaper or notice of any kind, with intent to procure, or to aid in procuring any divorce, either in this state or elsewhere, shall be fined not less than $100, nor more than $1,000 for each offense, or imprisonment in the county jail not less than three months, nor more than one year, or both in the discretion of the court.

This act shall not apply to the printing or publishing of any notice or advertisement required or authorized by any statute of the State of Illinois.

Approved April 12, 1877.

AN ACT to amend section 36 of an act entitled "An act to revise the law in relation to criminal jurisprudence," approved March 27, 1874.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That section 36 of an act entitled "An act to revise the law in relation to criminal jurisprudence," approved March 27, 1874, be and the same is hereby amended so as to read as follows: Sec. 36. Whoever willfully and maliciously and forcibly breaks and enters, or willfully and maliciously, without force (the doors or windows being open), enters into any dwelling-house, kitchen, office, shop, storehouse, warehouse, malthouse, stilling-house, mill, pottery, factory, wharf-boat, steamboat, or other water craft, freight or passenger railroad car, church, meeting-house, school-house, or other building, with intent to commit murder, robbery, rape, or mayhem, or other felony or larceny, shall be deemed guilty of burglary, and be imprisoned in the penitentiary for a term not less than one year nor more than twenty years.

Approved April 10, 1877.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

March Term, 1877.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

AGREEMENT TO PAY TAXES—DIFFERENCE BETWEEN TAXES "ASSESSED" AND "PAYABLE"—Under a contract by a lessee of real estate, to pay all taxes "legally required or demanded of the premises," and "within the year they become due," he will not be required to pay taxes *assessed* during the term, but *payable* after its expiration. This case is distinguishable from Valle v. Fargo, and Waterman v. Harkness, heretofore decided by this court. Judgment affirmed. Opinion by BAKEWELL, J.—*Doan v. Fallon.*

PRACTICE IN COURT OF APPEALS—PENALTY FOR FAILURE TO ASSIGN ERRORS AND FILE STATEMENT AND BRIEF.—Where no assignment of errors and no statement and brief are filed as required by law, and no cause for the failure is shown, on motion of respondent the judgment of the court below will be affirmed with an assessment of ten per cent. damages against appellant. [Citing Wag. Stat. p. 1066, § 22; p. 1067, § 31; p. 1068, § 35.] Judgment affirmed. Opinion by BAKEWELL, J.—*Klifman v. Skeele.*

PRACTICE AT LAW AND IN EQUITY—PARTIES DEFENDANT—COSTS.—In a proceeding by the holder of an allowed demand against the estate of a decedent, to set aside a final settlement for irregularities in publishing notice, etc., if a proceeding in equity, to subject real estate to payment of debts, the widow, as well as the heirs, should be made parties; if merely to set aside the final settlement, the administrator alone should be made party defendant. But, as the circuit court assumed jurisdiction, the widow should have been brought in by summons so as to do complete justice, it appearing that the property is sufficient to pay the debt. Costs should be awarded against the administrator who made the false settlement alone. Judgment reversed. Opinion by BAKEWELL, J.—*Keitkamp v. Biederstein.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY—REPLEVIN AND DETINUE—ALLEGATA AND PROBATA—VARIANCE.—The statutory proceeding for the claim and delivery of personal property in this state (Wag. Stat. 1023) resembles the common-law actions of replevin and detinue. Where plaintiff alleges in his petition, that the property claimed is in the possession of defendant, and it turns out on the trial that defendant had not the property in possession, there is a variance between the allegations and the proof. Plaintiff is not at liberty to allege anything he pleases, and recover on his proofs at variance with his petition. An action for the specific recovery of personal property can not be maintained in this state, where the defendant was not in possession or control of the goods at the time of the commencement of the action. [Citing Johnson v. Garlick, 25 Wis. 705; Coffin v. Gephart, 25 Ia. 257; Houghton v. Newbury, 69 N. C. 456; Hall v. White, 106 Mass. 599; Mitchell v. Roberts, 50 N. H. 485.] Judgment reversed. Opinion by BAKEWELL, J. — *Davis v. Randolph.*

FRAUD—EVIDENCE OF CONTRACTS IN WRITING—PRACTICE—IMMATERIAL AVERMENTS.—In an action on a written contract of subscription to a fund for the erection of a hotel, where the answer admits the execution of the contract, but says it was procured by false and fraudulent representations, as set out in the answer, and such representations appear not to be false or fraudulent in law, and would not be sufficient to set aside the contract in equity,—such answer would not amount to a defense to an action at law. Evidence offered to contradict the terms of a written contract is incompetent. Where statements and representations are made in the course of antecedent conversation, and the contract is afterwards reduced to writing, the parties are only bound by the written statements. But in case of fraud, what transpired before the execution of the contract might be proven to impeach its fairness. [Citing 8 Wheat. 211]. Fraud vitiates all contracts at common law. [Citing 3 Coke R. 78]. Whether representations made by the agent of plaintiff as to the manner of constructing the hotel, so as not to be offensive to defendant, were made in good faith, is immaterial. If defendant wished to rely upon them, he should have had them inserted as conditions in the contract. Judgment affirmed. Opinion by BAKEWELL, J.—*New Lindell Hotel Co. v. Bailey.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

February Term, 1877.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE, }
" WILLIAM E. NIBLACK, } Associate Justices.
" SAMUEL E. PERKINS, }
" GEORGE V. HOWK, }

WILL—UNCERTAINTY AS TO DEVISEES.—Where a will provided that the beneficiaries of the trust should be all the poor widows and women whose husbands had left them unprovided for, without any just cause, of or over the age of fifty years, of irreproachable character, who had resided not under three years within eight miles of the town of Winslow, and who had no certain income; *held*, there was not such vagueness or uncertainty as to the devisees as would invalidate the will. Judgment reversed. Opinion by HOWK, J.—*De Bruler et al. v. Ferguson, Adm'r, etc.*

PUBLIC OFFICER — BRIBERY — "UNDUE REWARD."—To make out a case of bribery under a statute providing that the acceptance, by a prosecuting attorney, of any "money, gift, property or undue reward, with the corrupt purpose," etc., it must be shown that the officer received something of value. It is not enough to show that something of value was promised to be paid; and a note executed to the officer for the purpose of improperly influ-

encing his official conduct, being without a valid consideration and void, must be held to be of no value, and not an undue reward within the meaning of the statute. Judgment affirmed. Opinion by NIBLACK, J.—*State of Indiana v. Walls.*

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—PLEADING.—In an action to set aside an alleged fraudulent conveyance of real estate, and subject the same to the payment of a judgment in favor of a creditor of the grantor, it is necessary to allege in the complaint and prove on the trial that, at the time the conveyance was made, the debtor did not have left enough other property subject to execution to pay all his debts, and it is not sufficient to charge that, some months or years after the conveyance was executed, no other property could be found on which to levy, or that it was subsequenly ascertained that the debtor had become wholly insolvent. Judgment reversed. Opinion by NIBLACK, J.—*Sherman et al. v. Hogland.*

LIABILITY FOR SALE OF INTOXICATING LIQUORS—REMOTE CONSEQUENCES.—Under the 12th section of the liquor law of 1873, a wife may sue for the death of her husband caused by intoxication; but the seller of the intoxicating liquor can not be held liable for consequences which are not the natural result of his act, and the death of the intoxicated person caused by a train of cars is not naturally or necessarily connected with the fact of selling liquor to him. The death need not take place immediately and directly upon the cause, but it must be produced by a chain of natural causes and effects unchanged by human action, or the party who committed the first act will not be responsible. The running of the train of cars in this case was the human action which changed the course of natural effects and causes connected with the act of selling the intoxicating liquor. 56 Ind. 311. Judgment reversed. Opinion by BIDDLE, J.—*Collier v. Earley.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

[Filed at Ottawa, Jan. 31, 1877].

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE, }
" PINCKNEY H. WALKER, }
" ALFRED M. CRAIG, } Associate Justices.
" JOHN SCHOLFIELD, }
" JOHN M. SCOTT, }
" T. LYLE DICKEY, }

TRUSTEE'S SALE—TIME FOR PAYING BID—POWER OF RECEIVER—ERRORS.—1. On a trustee's sale of land under a power in a trust-deed, made late in the afternoon, a party bid $2,938, and the holder of the notes bid $10,770, and exhibited his certified check upon a bank for $10,000, and paid the amount of his bid on the following Monday: *Held*, on a contest between the bidders as to their rights to a deed, the sale being announced for cash, that the payment on the following Monday was a substantial compliance with the terms of the sale. 2. When the holdor of notes, secured by deed of trust, becomes the purchaser of property at the trustee's sale, a mere indorsement of the amount of his bid on the notes will be a sufficient compliance with the power and terms of sale requiring to be for cash. 3. A receiver of an insurance company, holding notes given to the company and secured by deed of trust, has the rightful power to bid off the property to save a sacrifice. He succeeds to the rights of the company in this respect. A bidder at a trustee's sale of property under a trust deed, which has been reformed for a mistake, can not assign for error any matter in the decree of reformation, or its directing a deed to be made without redemption, as he has no interest in these questions. Opinion by SHELDON, C. J.—*Jacobs v. Turpin.*

RAILROADS—RIGHT TO CONDEMN PROPERTY—POWER OF CORPORATION DE FACTO—PRACTICE.—1. It matters not whether certain railway companies were empowered by their charters to construct a railroad within the city of Chicago, if, after their consolidation, the legislature, by an amendatory act, recognizes the existence of the consolidated company and the name adopted, and its authority so to construct its road, as this will confer the power. 2. A provision, an act amendatory of the charter of a railway company, that the rate of speed at which its trains, etc., may be run in the city, shall be under the control of the common council, is a legislative recognition of its rights to construct its road within the city limits. 3. In a proceeding by a railway company to condemn land for the use of its road, it is sufficient that it is *de facto* a corporate body. 4. After the introduction of evidence on an assessment of damages for property sought to be condemned, the court, on motion of certain tenants of one of the land owners, swore the jury to try the issues presented by their pleas questioning the right to condemn. The proof of these issues was nothing more than what the land owners insisted upon, and this, working them no prejudice, was held no error as to them. 5. Where the witnesses on both sides, in a proceeding to condemn property, testified as to its value at the date of the institution of the proceeding, except three, and from their testimony it did not appear that the property was worth more at the time of the trial, it was held that a modification of an instruction confining the jury to its value at the first date was not of sufficient importance to affect the rights of the land owner. Opinion by SHELDON, C. J.—*McAuley v. C. I. & C. R. R.*

PRACTICE—REFUSING LEAVE TO PLEAD AFTER DEMURRER—AFFIDAVIT OF MERITS—SET-OFF—CONTRACT—COMMON COUNTS.—1. When plaintiff files, with his declaration under sec. 37 of the practice act, the requisite affidavit, and the defendant demurs, and his demurrer is overruled, the question whether the court abuses its discretion in refusing leave to the defendant to plead, depends whether his affidavit, accompanying his plea, shows a substantial defense to the merits. 2. If the affidavit accompanying the plea proposed to be filed after the overruling of a demurrer to the declaration, does not show facts necessarily constituting a defense, the court is warranted in refusing leave to file the plea. 3. When a defendant undertakes to set up by affidavit the facts relied on to sustain his plea, he will be held to the same strictness in matters of substance as in pleading. 4. Where real estate is bought under a warranty deed, and there is an apparent incumbrance found not satisfied of record, and the grantor proposes to allow the expenses of recovering the same, a plea of set-off as to such expenses to a suit upon notes given for the purchase-money, which fails to show that the defendant accepted the offer and expended his time and money on the faith of it, and shows no consideration for the promise, and does not distinctly aver that the amount of the proposed set-off is then due and unpaid, is substantially defective. 5. The fact, that notes are given for a larger sum than was agreed by the parties to be due for land purchased, does not render them void, but goes to the consideration partially, and there may be a recovery *pro tanto*. 6. If a note, given for the purchase of land, is held void for any cause, a recovery may be had under the common counts of the sum actually due. Opinion by SCHOLFIELD, J.—*McCord v. Crooker.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

TAXATION OF COSTS.—Where the costs, in a case brought to the supreme court, have not yet been taxed, and the judgment, with reference to the amount thereof, is left blank, but the judgment will authorize a correct taxation of the costs; it will be presumed that the costs will be taxed correctly, and the judgment will not be reversed because of any supposed danger of the costs being taxed incorrectly. Opinion by VALENTINE, J.—*Clippenger v. Ingram.*

OFFER TO ALLOW JUDGMENT TO BE TAKEN UNDER THE CODE.—A defendant in a civil action for assault and battery may, at any time before trial, although he may have already answered by filing a general denial, serve upon the plaintiff, in accordance with section 523 of the civil code, an offer in writing to allow judgment to be taken against him for a sum specified in such offer; and then, if the plaintiff fail to accept such offer, and afterwards fails to recover judgment against the defendant for more than the amount so offered, the defendant may, in the same action, recover judgment against the plaintiff for costs accru-

ing after such offer. Opinion by VALENTINE, J.—*Clippenger v. Ingram.*

OFFICE OF BILL OF EXCEPTIONS.—1. The office of a bill of exceptions is to bring upon the record some portion of those proceedings in a cause which do not otherwise go upon the record. It must, therefore, be filed in the court in which the proceedings are had, and then becomes itself a part of the record of the cause. If a party desires to use this part of the record in proceedings in error, he should obtain a certified transcript and attach the same to his petition in error. He may not take the original bill of exceptions signed, but never filed, and therefore never a part of the record, and attach that to his petition in error as sufficient evidence of the proceedings claimed to be erroneous. Opinion by BREWER, J.—*Jackson v. Stoner, Adm'r.*

BILL OF EXCHANGE—BONA FIDE HOLDER.—1. When a bill of exchange of a third party, payable to order, is indorsed before maturity as collateral security for a debt contracted at the time of said indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and payment by the acceptor to the indorser, without authority from the indorsee, will not discharge the bill. 2. Where Y. B. & Co., payees of a bill of exchange, indorse the bill before maturity to a bank, as collateral security for an advance thereon, at the time of the transfer, and the bank, upon the payment of the bill, is to apply the proceeds thereof in payment of such consideration, and after protest of the bill for non-payment, the acceptors remit to Y. B. & Co. the amount of the bill without authority from the bank, and Y. B. & Co. fail to turn over the remittance from the acceptors to the bank; *held*, in an action on the bill by the bank against the acceptors, that the court erred in instructing the jury to the effect, if they found the truth to be that Y. B. & Co., the original payees, simply indorsed the draft to the bank for collection, with authority or directions to apply the proceeds when collected to the account which the bank had with the said Y. B. & Co., the bank holding and accepting the paper, under such circumstances, became the agent or trustee of Y. B. & Co., as such instruction was not warranted by the evidence, and was liable to mislead the jury to the prejudice of the bank. Opinion by HORTON, C. J.—*State Savings Ass. of St. Louis v. Hunt.*

ABSTRACTS OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1877.

[To appear in 41 Wis.]

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

SALE OF LUMBER-ESTIMATE OF QUALITY MADE BY THIRD PARTY—EVIDENCE—CUSTOM.—1. On a sale and delivery of lumber, where it is a part of the agreement between the parties that the quantity and quality shall be estimated by a third person named, his estimate is binding unless impeached for fraud or mistake. 2. The lumber sold being, at the time of sale, piled in a certain city in another state, evidence of a custom in that city that, when lumber had been estimated in the pile, the seller should deduct from the estimate one-half the sheeting contained therein, was inadmissible without proof that the custom was known to the parties, or had existed so long as to warrant a presumption that they contracted with reference to it. Opinion by COLE, J.—*Scott v. Whitney.*

SALE OF GOODS—REPRESENTATIONS—EVIDENCE.—1. Hop roots were sold upon a representation that they "were all right and would grow," and they did grow, but proved to be nearly worthless, a large portion being male roots, and others wild. *Held*, that the question whether such representation was a warranty of the quality of the roots in any other respect than their vitality or power of growth, was properly submitted *to the jury* upon all the facts in evidence. 2. Where the damages claimed for breach of the warranty as to such roots were only for the failure of the crop of the year in which they were first planted, evidence of the character of the crop produced by the same roots *the next year*, as compared with that produced by other roots in that year, with the same soil and cultivation, was admissible to show the quality of the roots in question. Opinion by COLE, J.—*Brooks v. McDonnell.*

RAILWAY NEGLIGENCE—KNOWLEDGE OF CONDUCTOR—NOTICE.—The owner of certain horses and goods, destined for the village of L., shipped them in a common box stock car of the defendant, which car was to be run on defendant's road to A., and thence on its branch road to L.; and plaintiff, who was employed by the owner to accompany him and aid in taking care of the property, rode with it in said box car to A., with the knowledge and consent of the conductor who ran the train to that point. Such conductor in fact received fare for plaintiff's ride from A. to L. (which was not in his run), though he had no authority to do so. Some hours after the arrival of said car at A., when the train, of which it was then a part, was about starting for L., plaintiff went into said car without the knowledge or consent of the conductor or other persons in charge of that train, and without doing anything to bring the fact to their attention before the accident complained of. Before the train started, the car was locked by one of defendant's employees; and afterwards, while in motion, goods therein took fire through defendant's alleged negligence, and plaintiff was injured before he could procure the door to be opened. *Held*, that defendant was not chargeable with notice of plaintiff's presence in the box car between A. and L. merely by reason of the knowledge possessed by the first conductor. Opinion by COLE, J.—*Jenkins v. C. M. & H. P. R. R.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" CHARLES DEVENS, JR.,
" OTIS P. LORD,

BOND—EVIDENCE.—1. In an action upon a bond, running to "The Williamsburg City Fire Insurance Company of Brooklyn, New York," and its "successors and assigns," such recital was *held* sufficient *prima facie* evidence of the incorporation of the plaintiff. Williams v. Cheney, 3 Gray, 215; Topping v. Bickford, 4 Allen, 120; Conard v. Atlantic Ins. Co., 1 Pet. 386, 450. 2. One condition of the bond being that the obligor should keep true and correct books, a book kept by him, containing entries relating only to the business of the company, was competent evidence against him and his sureties, of the amount of premiums collected by him. Whitnash v. George, 8 B. & C. 556; s. c. 3 M. & Ry. 46; 1 Taylor on Ev., § 710. Opinion by GRAY, C. J.—*Williamsburg City Fire Ins. Co. v. Frothingham.*

FOREIGN JUDGMENT—SERVICE.—1. In an action upon a foreign judgment, the question whether such judgment binds the defendant depends upon the question whether the writ in that action was duly served upon him. 2. The defendant introduced evidence that he was not at the time of such alleged service, and had never since been, in the state where such judgment was rendered. Evidence of an admission by the defendant that he knew of the bringing of the action in such state, taken in connection with other testimony introduced by the plaintiff to show that the defendant was in that state at the time of the service, was competent to contradict the evidence introduced by the defendant, and to support the plaintiff's action upon the judgment. Knowles v. Gaslight & Coke Co., 19 Wall. 58; McDermott v. Clary, 107 Mass. 501. Opinion by GRAY, C. J.—*Sears v. Dacey.*

REVIEW—AMENDMENT—CHANGE OF PARTIES.—Petition for review of an action of replevin, which had been brought by the defendant in review to recover a certain lot of flour which had been sold by the plaintiffs to one Dupee, in which action the warehousemen who held the flour were nominally defendants, and which had been defaulted. The warehousemen had no other interest in the flour than simply as warehousemen, and, therefore, took no measures to defend the action. Meantime the purchaser became bankrupt, and when afterward his assignees in bankruptcy were appointed, judgment had been entered in the case upon default. Being the parties really interested in the flour, the assignees filed a petition to review the action. *Held*, 1. that a writ of review, like a writ of error, must be in the name of a party to the original judgment, or of those who

have by law succeeded to his rights upon his death or bankruptcy. Gen. Stat. c. 146, §§ 30-38; Johnson v. Thaxter, 7 Gray, 242. As Dupee, the owner of the goods replevied, was not a party of record to the original action, his assignees in bankruptcy could not maintain a petition for review in his or their name. 2. But Depee, or his assignee, representing him, may have been under obligations to protect the warehousemen, and might, with their assent, have assumed the defense of that action in their name. White v. Dolliver, 113 Mass. 400. The real party in interest may, upon indemnifying the formal party of record against costs, be allowed to sue out a writ of review in his name. Fuller v. Storer, 111 Mass. 281. 3. The statutes authorize amendments by change of parties or of forms of action, or in other matters, either of form or substance, to enable the plaintiff to maintain the suit for the cause for which it was intended to be brought. Gen. Stat. c. 129, §§ 41, 82. 4. These statutes permit the substitution of a new plaintiff, and are applicable to petitions for review. Crafts v. Sikes, 4 Gray, 194; Emery v. Osgood, 1 Allen, 244; Davenport v. Holland, 2 Cush. 1. Opinion by GRAY, C. J.—*Winch v. Hosmer.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE, }
" W. B. RODMAN, } Associate Justices.
" W. P. BYNUM, }
" W. T. FAIRCLOTH, }

A BOARD OF COUNTY COMMISSIONERS, in canvassing the votes cast in an election, have no right to go behind the returns sent up by the judges of election from the respective townships of the county.—*Moore v. Jones.*

PAROL EVIDENCE AS TO MEANING OF WORDS—EXCEPTION TO INSTRUCTION—CHALLENGE.—What is meant by the word "dollar" in a note case can be shown by *parol* evidence. A general exception to the whole instruction of the court below must be overruled if any part of it is right. Whether there are one or more plaintiffs or defendants, only four peremptory challenges to the jury on either side are allowable.—*Bryan v. Harrison.*

ACTION ON BOND PAYABLE IN "CURRENT FUNDS"—PAROL EVIDENCE.—On the trial of an action brought upon a bond dated August 19th, 1864, and payable six months after date, and expressed "to be paid in current funds when called for," it is not competent to prove that there was an agreement at the time the bond was executed that it should be paid in Confederate money.—*Davis v. Glenn et al.*

ONE WHO MALICIOUSLY PERSUADES ANOTHER TO BREAK A CONTRACT with a third person is liable to such person for damages. *Therefore*, in an action for damages, where the plaintiff had made a contract with a railroad company of which the defendant was president and superintendent, which contract the defendant maliciously, and in order to injure the plaintiff, refused to complete; *held*, that the plaintiff is entitled to recover.—*Jones v. Stanly.*

WHEN ORDER OF COURT UNNECESSARY—DEFECTIVE DESCRIPTION IN DEED—JOINDER OF CLAIMS.—It does not require an order of court to authorize the *bona fide* receipt of money by a clerk and master, upon a bond before its maturity, given for the purchase of land at a sale under decree of court which has been duly confirmed. After the payment of the purchase-money for land sold under decree of court, an order of court is not necessary to enable the master to make a valid deed to the purchaser. In case, however, the master and purchaser take upon themselves the risk of determining that the case is one in which such an order would be fit and proper, "That John Brown, the ancestor of the petitioners, died seized and possessed of a tract of land in said County of Guilford on the waters of 'Stinking Quarter,' adjoining the lands of ——," is not so defective a description that it may not be possible to identify with certainty the land meant. A claim for the recovery of real estate which has been sold under decree of a court of equity can not be joined in the same action with a claim against the clerk and master for the purchase-money. *Brown et al. v. Cable et al.*

NOTES.

THE new jury law of Florida provides that, when in any case, civil or criminal, a knowledge of reading, writing, and arithmetic is necessary to enable a juror to understand the evidence to be offered, he may be challenged if he does not possess such qualifications.

CHIEF JUSTICE GRANT, a Scotch judge, was called "the silent man." A couple of barristers once argued before him for two whole days the point whether a certain offense came within the purview of a certain act of Parliament. When the judge was quite sure they had exhausted their arguments, if not themselves, he quietly observed: "The act you refer to has been repealed."

The English Court of Appeal, (25 W. R. 159), have lately affirmed the judgment of the Court of Common Pleas in Seaman v. Netherclift, reported at length in this journal, 3 Cent. L. J. 543, holding that words spoken by a witness as such, and with reference to the subject of inquiry, are not actionable. The defendant, who was an expert in handwriting, was called as a witness before a magistrate on a preliminary investigation of a charge of forgery. In cross-examination he was asked if he had read the comments made by the judge in a previous case upon his evidence; having answered that he had, he voluntarily added a statement affirming that evidence in words defamatory of the plaintiff. It was held, that the words were spoken as a witness, and with reference to the subject of inquiry, and were therefore privileged.

PROFESSIONAL COSTUME ONCE MORE.—The London Law Times gives the following rather amusing scene in the Natal Supreme Court. Dr. Smith, a barrister, late of the Norfolk Circuit, England, who, since his arrival in Natal, has acted as editor of a newspaper called the Witness, published at Maulzburg, brought an action against the Times of Natal, the opposition newspaper, for libel. He claimed £500 damages, on the ground that the Times had accused him of scurrility. The learned doctor attended at the supreme court, which was presided over by Connor, C. J., for the purpose of arguing his exceptions to the defendant's pleas, and was attired in the wig and gown of an English barrister. He was proceeding to argue his exceptions to the defendant's pleas, when the chief justice, in interrupting him, said: "You are not in costume." Dr. Smith looked puzzled, and the chief justice repeated the expression.

Dr. Smith—I am not aware that there is anything wrong in my attire.

The Chief Justice—Yes, there is. You are dressed as an English barrister and not as an advocate of this court.

Dr. Smith said he was very sorry if his robes were any way irregular, and he would be happy on another occasion to make any alteration which his lordship would desire.

The Chief Justice—You must do it now. I can not hear you unless you do it.

Dr. Smith (in astonishment)—Do I understand your lordship to direct me to alter my attire in open court?

The Chief Justice—Yes, if you wish to be heard.

Dr. Smith—Would your lordship kindly indicate to me the nature of the change which I am to make at so short a notice?

The Chief Justice—You wear a wig. You must take it off.

Dr. Smith—A wig is an antiquated article of attire, till lately worn, in some shape, by gentle-people. Any man is entitled to wear artificial hair here or in the street, and doing so, is at most an eccentricity.

The Chief Justice—Not so. It is a covering to the head, like a hat or any other, and you must not appear here covered.

Dr. Smith—Now that your lordship has expressed that view, which is quite new to me, I presume your lordship will not put me to the trouble of making the alteration now, but will allow me to correct the mistake another time? It would be more usual and more agreeable.

The Chief Justice (with energy)—No, now. If not, we must adjourn the case. When shall we adjourn it to?

Dr. Smith—As far as I understand your lordship, if I take my wig off, I may go on?

The Chief Justice—Yes.

Dr. Smith (putting his wig on the table)—Then there it is, my lord; and I have six objections to the defendant's plea.

The whole of the doctor's objections, except one, were overruled.